

## 13 Am. Jur. 2d Business Trusts Summary

American Jurisprudence, Second Edition | May 2021 Update

### Business Trusts

Karen L. Schultz, J.D.

### [Correlation Table](#)

## Summary

### Scope:

This article considers the "Massachusetts" or business trust, an organization created voluntarily by a trust instrument whereby trustees manage the trust estate for the benefit of holders of transferable certificates representing their proportionate interests and rights in the proceeds and corpus of a trust estate. Matters treated include the creation, organization, and duration of a business trust; the nature, attributes, and liability of the trust estate; shareholders, members, or cestuis que trustent, and their rights, shares, and liabilities; trustees, officers, and agents of such a trust, as well as their powers, rights, and liabilities. The article also considers taxation and governmental regulation of business trusts; the termination, dissolution, reorganization, and merger of such trusts; and practice and procedure in cases involving business trusts, insofar as that procedure is peculiarly relevant or distinctively applied to such trusts.

### Federal Aspects:

Business trusts are regulated by a variety of federal securities acts and are subject to taxation under the Internal Revenue Code.

### Treated Elsewhere:

Bankruptcy, eligibility of business trust for relief in, see [Am. Jur. 2d, Bankruptcy § 48](#)

Corporations, see [Am. Jur. 2d, Corporations §§ 1 et seq.](#)

Foreign corporations, see [Am. Jur. 2d, Foreign Corporations §§ 1 et seq.](#)

Joint-stock companies, see [Am. Jur. 2d, Joint-Stock Companies §§ 1 et seq.](#)

Joint ventures, see [Am. Jur. 2d, Joint Ventures §§ 1 et seq.](#)

Partnership, see [Am. Jur. 2d, Partnership §§ 1 et seq.](#)

Securities regulation, see [Am. Jur. 2d, Securities Regulation—Federal §§ 1 et seq.](#); [Am. Jur. 2d, Securities Regulation—State §§ 1 et seq.](#)

Subscriptions, see [Am. Jur. 2d, Subscriptions for Charitable or Public Purposes §§ 1 et seq.](#)

Trusts, see [Am. Jur. 2d, Trusts §§ 1 et seq.](#)

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## 13 Am. Jur. 2d Business Trusts § 1

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### Business Trusts

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#### I. Definitions and Nature; Validity

##### A. In General

### § 1. Definitions and terminology of business trusts

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#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3580](#), [3581](#), [3600](#)

#### A.L.R. Library

[Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704](#)

One of the distinctive devices by means of which individuals may combine their resources to operate a business for profit is the so-called business trust or "Massachusetts trust," which may be comprehensively defined as an unincorporated business organization<sup>1</sup> created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate.<sup>2</sup> In general, "business trust" denotes an unincorporated organization created for profit under a written instrument or declaration of trust, the management to be conducted by compensated trustees for the benefit of persons whose legal interests are represented by transferable certificates of participation, or shares.<sup>3</sup> A "Massachusetts Business Trust" is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided; those certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.<sup>4</sup> Such an organization has also been frequently termed a "common-law trust."<sup>5</sup> A Delaware statutory trust is a "business trust."<sup>6</sup>

Under the Uniform Commercial Code, the term "person" means, inter alia, a business trust.<sup>7</sup>

**Observation:**

Federal law governs the determination of whether a trust is a "business trust" eligible for bankruptcy relief.<sup>8</sup>

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Footnotes

- 1 In re Dille Family Trust, 598 B.R. 179 (Bankr. W.D. Pa. 2019).
- 2 Hecht v. Malley, 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924); Inside Scoop, Inc. v. Curry, 755 F. Supp. 426 (D.D.C. 1989), order aff'd, 923 F.2d 201 (D.C. Cir. 1991) (applying District of Columbia law); Pacific Am. Realty Trust v. Lonctot, 62 Wash. 2d 91, 381 P.2d 123 (1963).  
A business trust is also known as a "Massachusetts trust." In re Green Valley Financial Holdings, 32 P.3d 643 (Colo. App. 2001).
- 3 France v. Thermo Funding Co., LLC, 989 F. Supp. 2d 287 (S.D. N.Y. 2013).
- 4 Catholic School Employees Pension Trust, 599 B.R. 634 (B.A.P. 1st Cir. 2019); Forbes v. Forbes, 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 5 In re Green Valley Financial Holdings, 32 P.3d 643 (Colo. App. 2001); Matter of Trust Known as Great Northern Iron Ore Properties, 263 N.W.2d 610 (Minn. 1978); Brown v. Donald, 216 S.W.2d 679 (Tex. Civ. App. Fort Worth 1949).
- 6 France v. Thermo Funding Co., LLC, 989 F. Supp. 2d 287 (S.D. N.Y. 2013).
- 7 U.C.C. § 1-201(b)(27).
- 8 Catholic School Employees Pension Trust, 599 B.R. 634 (B.A.P. 1st Cir. 2019).

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## 13 Am. Jur. 2d Business Trusts § 2

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### Business Trusts

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#### I. Definitions and Nature; Validity

##### A. In General

## § 2. Nature and attributes of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3580](#), [3581](#), [3600](#)

The business trust is created by the voluntary act of the parties and is based on a contract; it is intended for the purpose of carrying on some kind of business or commercial activity for profit.<sup>1</sup> A "business trust" is a type of business formation comprising an arrangement whereby property is actually conveyed to a trustee, who holds and/or manages the same for the benefit of the holders of transferable certificates issued by the trustee; such a relationship exists by reason of a trust instrument and the participants.<sup>2</sup> Stated more simply, a business trust is a business organization in a trust form.<sup>3</sup> The most significant characteristic of a business trust, and the most important distinction between such trusts and ordinary trusts established by will or inter vivos, lies in the fact that the business trust is organized not as a means of effecting a gift or transfer but as a device for profit-making through the combination of capital contributed by a number of investors.<sup>4</sup>

In some respects, business trusts closely resemble both partnerships and corporations.<sup>5</sup> However, regardless of its similarity to an ordinary trust, to a partnership, and to a corporation, the general opinion is that the business trust should be regarded as sui generis.<sup>6</sup> The character of a business trust is to be determined from the trust instrument.<sup>7</sup> A declaration of trust and a business trust's bylaws are a contract between the trustees of the trust and the shareholders that defines the rights of the trust's shareholders.<sup>8</sup>

Ultimately, in a business trust, the relationship of the grantor to the property transferred does not differ in any material aspect before and after the creation of the trust.<sup>9</sup>

**Observation:**

A real estate investment trust (REIT) is an entity that may receive income from only particular real estate interests, including mortgages.<sup>10</sup> A "captive real estate investment trust" is a business structure in which a corporation owns a holding company which in turn owns a MW says no hyphen real estate investment trust.<sup>11</sup>

There is a difference of opinion on the question whether a Massachusetts or business trust is a distinct legal entity and some courts answer the question in the affirmative,<sup>12</sup> and some statutes designate or recognize the organization as a distinct legal entity.<sup>13</sup> Other courts have taken the view that a business trust is not a distinct legal entity.<sup>14</sup>

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**Footnotes**

- 1 [Inside Scoop, Inc. v. Curry](#), 755 F. Supp. 426 (D.D.C. 1989), order *aff'd*, 923 F.2d 201 (D.C. Cir. 1991) (applying District of Columbia law); [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013); [Matter of Walker](#), 79 B.R. 59 (Bankr. M.D. Fla. 1987); [In re Gurney's Inn Corp. Liquidating Trust](#), 215 B.R. 659 (Bankr. E.D. N.Y. 1997).
- 2 [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019).
- 3 [In re Green Valley Financial Holdings](#), 32 P.3d 643 (Colo. App. 2001).
- 4 [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013).
- 5 [Oklahoma Fullers Earth Co. v. Evans](#), 1937 OK 79, 179 Okla. 124, 64 P.2d 899 (1937).  
As to distinctions from other organizations and relationships, see §§ 5 to 8.  
As to nature of corporations, generally, see [Am. Jur. 2d, Corporations](#) §§ 1 to 5.  
As to nature of partnerships, generally, see [Am. Jur. 2d, Partnership](#) §§ 1 to 11.
- 6 [Thomle v. Soundview Pulp Co.](#), 181 Wash. 1, 42 P.2d 19 (1935).  
Business trusts with transferable shares are hybrid business organizations that are neither partnerships nor corporations. [Minkin v. Commissioner of Revenue](#), 425 Mass. 174, 680 N.E.2d 27 (1997).
- 7 [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013); [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019).  
As to trust instrument in business trusts, see § 10.
- 8 [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 9 [Ruby Mountain Trust v. Department of Revenue of State of Montana](#), 2000 MT 166, 300 Mont. 297, 3 P.3d 654 (2000).
- 10 [Associated Bank, N.A. v. Commissioner of Revenue](#), 914 N.W.2d 394 (Minn. 2018).
- 11 [HMN Financial, Inc. v. Commissioner of Revenue](#), 782 N.W.2d 558 (Minn. 2010).
- 12 [In re Vento Development Corp.](#), 560 F.2d 2 (1st Cir. 1977) (applying Puerto Rico law); [Lafayette Bank & Trust Co. v. Branchini & Sons Const. Co., Inc.](#), 32 Conn. Supp. 124, 342 A.2d 916 (Super. Ct. 1975) (applying Maryland law).  
Unlike traditional trusts, a business trust may be treated as a separate entity. [Portico Management Group, LLC v. Harrison](#), 202 Cal. App. 4th 464, 136 Cal. Rptr. 3d 151 (3d Dist. 2011).

- 13 [Edwards v. Belknap](#), 66 Idaho 639, 166 P.2d 451 (1946).
- 14 [Linn v. Houston](#), 123 Kan. 409, 255 P. 1105 (1927); [Gordon Campbell Petroleum Co. v. Gordon Campbell-Kevin Syndicate](#), 75 Mont. 261, 242 P. 540 (1926).
- Business trusts are not entities apart from the trustees. [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).

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## 13 Am. Jur. 2d Business Trusts § 3

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### Business Trusts

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#### I. Definitions and Nature; Validity

##### A. In General

### § 3. Validity of, and efficacy as, business trust

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#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3580](#), [3581](#), [3600](#)

Although there is authority indicating that a "business trust" where certificates of beneficial ownership are issued to beneficiaries is void,<sup>1</sup> broadly speaking, business trusts are regarded as legal and valid.<sup>2</sup>

#### Practice Tip:

While business trusts are subject to the general principles of law governing the legality of contracts and trusts and must conform with the public policy of the state, a court will not declare such a trust void unless impelled to do so by clear and firmly established principles.<sup>3</sup>

Public policy is not offended by permitting a business to be carried on by trustees who limit their liability to the trust estate.<sup>4</sup> The fact that persons appointed as trustees are shareholders in the trust does not affect the validity of the trust.<sup>5</sup> However, there can be no valid business trust, at least for the purpose of exempting the shareholders from personal liability, where all of the shareholders are trustees and the trustees and shareholders are identical persons,<sup>6</sup> although the organization may subsequently become valid when persons other than the trustees become shareholders.<sup>7</sup>



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Footnotes

- 1 [Ruby Mountain Trust v. Department of Revenue of State of Montana, 2000 MT 166, 300 Mont. 297, 3 P.3d 654 \(2000\).](#)  
[As to shares and certificates in business trusts, see §§ 15 to 19.](#)
- 2 [Hemphill v. Orloff, 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 \(1928\); Dunbar v. Redfield, 7 Cal. 2d 515, 61 P.2d 744 \(1936\); State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 \(1942\); Brown v. Bedell, 263 N.Y. 177, 188 N.E. 641 \(1934\); Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Wallace, 346 Pa. 532, 31 A.2d 71, 156 A.L.R. 1 \(1943\).](#)
- 3 [Liberty Nat. Bank & Trust Co. in New York v. New England Investors Shares, 25 F.2d 493 \(D. Mass. 1928\).](#)
- 4 [Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 \(1927\).](#)  
[As to liability to the trust estate, generally, see §§ 46 to 49.](#)
- 5 [Commercial Cas. Ins. Co. v. North, 320 Ill. App. 221, 50 N.E.2d 434 \(2d Dist. 1943\); Darling v. Buddy, 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 \(1927\).](#)  
[As to eligibility to serve as trustee of business trust, see § 32.](#)  
[As to eligibility as shareholder of business trust, see § 21.](#)
- 6 [Enochs & Flowers v. Roell, 170 Miss. 44, 154 So. 299 \(1934\).](#)
- 7 [Henry G. Taussig Co. v. Poindexter, 224 Mo. App. 580, 30 S.W.2d 635 \(1930\).](#)

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## 13 Am. Jur. 2d Business Trusts § 4

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### Business Trusts

Karen L. Schultz, J.D.

#### I. Definitions and Nature; Validity

##### A. In General

### § 4. What law governs business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3582

An instrument creating a business or Massachusetts trust should be construed by the law of the state where the trust is organized.<sup>1</sup> A statute of the state in which a trust is organized, authorizing suit and attachment against such a trust and providing a specific manner for service of process, is applicable in an action in another state,<sup>2</sup> and failure to comply with the stipulated method of service of process confers on the court of the forum state no jurisdiction of an action against a business trust.<sup>3</sup> The law of the state wherein a business trust is organized will not be applied to produce a result contravening the public policy of the forum state and accordingly, courts have refused as violative of the public policy of the forum state to give effect to provisions of trust instruments executed in other states purporting to exempt shareholders from personal liability for the debts of the trust.<sup>4</sup>

The declaration of trust may contain a provision as to which jurisdiction's law should govern disputes.<sup>5</sup>

#### Observation:

Because business trusts possess many of the attributes of corporations, they cannot be governed solely by the rules which have evolved for traditional trusts.<sup>6</sup>

Federal law governs the determination of whether a trust is a "business trust" eligible for bankruptcy relief.<sup>7</sup>

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Footnotes

- 1 [In re Associated Trust](#), 222 F. 1012 (D. Mass. 1914); [Textile Properties v. M.J. Whittall Associates](#), 157 Misc. 108, 282 N.Y.S. 17 (Sup 1934); [Marchulonis v. Adams](#), 97 W. Va. 517, 125 S.E. 340 (1924).  
When deciding whether, for determining citizenship for diversity jurisdiction purposes, a trust is of the "traditional" or "business" variety, the court ought to look to the law of the state where the trust was formed to determine whether the trust has the status of a person. [GBForefront, L.P. v. Forefront Management Group, LLC](#), 888 F.3d 29 (3d Cir. 2018).  
As to construction of trust instrument, see § 10.
- 2 [Textile Properties v. M.J. Whittall Associates](#), 157 Misc. 108, 282 N.Y.S. 17 (Sup 1934).
- 3 [Vischer v. Dow Jones & Co.](#), 325 Ill. App. 104, 59 N.E.2d 884 (1st Dist. 1945).  
As to process for business trust, see § 81.
- 4 [Farmers' & Merchants' Nat. Bank of Fort Worth, Tex. v. Anderson](#), 216 Iowa 988, 250 N.W. 214 (1933).
- 5 [Greenspun v. Lindley](#), 44 A.D.2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), order aff'd, 36 N.Y.2d 473, 369 N.Y.S.2d 123, 330 N.E.2d 79, 88 A.L.R.3d 697 (1975).  
New York law applied to claims by investors in real estate mortgage investment conduit (REMIC) securitization trusts, which alleged breach of contractual, fiduciary, and common-law obligations against the trustee, mortgage-loan servicer, and servicer's affiliates, where the trusts were governed by a pooling and servicing agreement (PSA) containing choice of law provisions that designated New York law for construing the PSA and trust ownership certificates, and the parties' reliance on New York law was sufficient to establish governing law for common-law tort and fiduciary duty claims. [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011).
- 6 [Richardson v. Clarke](#), 372 Mass. 859, 364 N.E.2d 804 (1977).  
As to nature of corporations, generally, see [Am. Jur. 2d, Corporations §§ 1 to 5](#).
- 7 [Catholic School Employees Pension Trust](#), 599 B.R. 634 (B.A.P. 1st Cir. 2019).

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## 13 Am. Jur. 2d Business Trusts § 5

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### Business Trusts

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#### I. Definitions and Nature; Validity

#### B. Other Organizations and Relationships Compared and Distinguished

## § 5. Distinction between business trust and ordinary trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3581

### A.L.R. Library

[Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704](#)

The basic distinction between business trusts and nonbusiness trusts is that business trusts are created for the purpose of carrying on some kind of business or commercial activity for profit; the object of a nonbusiness trust is to protect and preserve the trust res.<sup>1</sup> Business trusts differ from ordinary trusts in that the primary purpose of the Massachusetts or business trust is to conduct a business for profit while the object of the traditional trust is to hold and conserve particular property, and its powers are incidental to this purpose.<sup>2</sup> Distinctions between business trusts and traditional trusts include whether the trust was established to run a business enterprise, which is a characteristic of a business trust, and whether the beneficiaries have the power to elect and remove trustees and to control the trustees in the conduct of the business, which are characteristics of traditional trusts.<sup>3</sup> Earmarks of a business trust not usually found in an ordinary trust include the following characteristics: beneficial shares,<sup>4</sup> centralized management, continuity of life, transferability of interests, limited personal liability,<sup>5</sup> a profit motivation, and the ability of the shareholders to remove the trustees with or without cause.<sup>6</sup>

The most significant characteristic of a business trust, and the most important distinction between such trusts and ordinary trusts established by will or inter vivos, lies in the fact that the business trust is organized not as a means of effecting a gift or transfer but as a device for profit-making through the combination of capital contributed by a number of investors.<sup>7</sup> Holding

ownership interests in various businesses does not constitute running a specific business enterprise, which is a characteristic of a business trust; holding various assets in trust, including ownership interests in businesses, is the *raison d'être* of traditional nonbusiness trusts.<sup>8</sup>

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Footnotes

- 1 [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019).
- 2 [Morrissey v. Commissioner of Internal Revenue](#), 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); [Inside Scoop, Inc. v. Curry](#), 755 F. Supp. 426 (D.D.C. 1989), order *aff'd*, 923 F.2d 201 (D.C. Cir. 1991) (applying District of Columbia law); [Carey v. U.S. Industries, Inc.](#), 414 F. Supp. 794 (N.D. Ill. 1976) (applying Illinois law); [In re Treasure Island Land Trust](#), 2 B.R. 332 (Bankr. M.D. Fla. 1980); [In re Gurney's Inn Corp. Liquidating Trust](#), 215 B.R. 659 (Bankr. E.D. N.Y. 1997).  
A realty trust and a business trust are distinct entities. [Papale-Keefe v. Altomare](#), 38 Mass. App. Ct. 308, 647 N.E.2d 722 (1995).  
A general distinction between traditional and business trusts is that a traditional trust facilitates a donative transfer, whereas a business trust implements a bargained-for exchange. [GBForefront, L.P. v. Forefront Management Group, LLC](#), 888 F.3d 29 (3d Cir. 2018).  
As to purpose of express trust, generally, see [Am. Jur. 2d, Trusts § 19](#).
- 3 [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013).
- 4 [Jim Walter Investors v. Empire-Madison, Inc.](#), 401 F. Supp. 425 (N.D. Ga. 1975).  
As to shares and certificates of business trust, generally, see §§ 15 to 19.
- 5 [Ruby Mountain Trust v. Department of Revenue of State of Montana](#), 2000 MT 166, 300 Mont. 297, 3 P.3d 654 (2000).  
As to duration of business trust, generally, see § 14.  
As to transfer or pledge of shares or certificates of business trust, see § 18.  
As to liability for trust debts and obligations, generally, see §§ 24 to 31.
- 6 [Jim Walter Investors v. Empire-Madison, Inc.](#), 401 F. Supp. 425 (N.D. Ga. 1975).  
As to removal of trustees, generally, see § 37.
- 7 [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013).
- 8 [France v. Thermo Funding Co., LLC](#), 989 F. Supp. 2d 287 (S.D. N.Y. 2013).

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## 13 Am. Jur. 2d Business Trusts § 6

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### Business Trusts

Karen L. Schultz, J.D.

#### I. Definitions and Nature; Validity

#### B. Other Organizations and Relationships Compared and Distinguished

## § 6. Distinction between business trust and corporation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3581

It generally is held, so far as pure legal principle is concerned and apart from any declaration to the contrary in a statute or constitution, that a Massachusetts or business trust is not a corporation.<sup>1</sup> However, while a business trust is not a corporation, it has some of the attributes of a corporation<sup>2</sup> and is similar in its practical effect.<sup>3</sup>

Some courts have expressly held that a given business trust falls within the legal definition of a corporation.<sup>4</sup> Business trusts are sometimes and for some purposes, by constitution or statute, placed in the same category as corporations or, by definition, classified as such.<sup>5</sup> The fact that a business trust is regarded as a corporation for certain purposes, however, does not mean that the corporate analogy will be indiscriminately applied or that the organization will be treated as a corporation for all purposes.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Inside Scoop, Inc. v. Curry](#), 755 F. Supp. 426 (D.D.C. 1989), order aff'd, 923 F.2d 201 (D.C. Cir. 1991); [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).

A business trust is not subject to the constitutional limitations upon the right of corporations to hold real property. [State ex rel. Combs v. Hopping Inv. Co.](#), 1954 OK 125, 269 P.2d 997 (Okla. 1954).

<sup>2</sup> [Inside Scoop, Inc. v. Curry](#), 755 F. Supp. 426 (D.D.C. 1989), order aff'd, 923 F.2d 201 (D.C. Cir. 1991); [In re John M. Cahill, M.D. Associates Pension Plan](#), 15 B.R. 639 (Bankr. E.D. Pa. 1981); [Richardson v. Clarke](#), 372 Mass. 859, 364 N.E.2d 804 (1977).

Despite the close resemblance of a business trust to a corporation in its features of centralized control, limited liability, profit motivation, and free transfer of the beneficial interest, such a trust is not the equivalent of a

corporation for purposes of determining diversity of citizenship as a basis for federal jurisdiction. [Carey v. U.S. Industries, Inc.](#), 414 F. Supp. 794 (N.D. Ill. 1976).

As to nature of corporations, generally, see [Am. Jur. 2d, Corporations §§ 1 to 5](#).

3 [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).

4 [Rubens v. Costello](#), 75 Ariz. 5, 251 P.2d 306 (1952); [Chapman v. Department of Revenue](#), 110 Ill. App. 3d 82, 65 Ill. Dec. 642, 441 N.E.2d 1156 (1st Dist. 1982); [State ex rel. Ferguson v. United Royalty Co.](#), 188 Kan. 443, 363 P.2d 397 (1961).

5 [Weber Engine Co. v. Alter](#), 120 Kan. 557, 245 P. 143, 46 A.L.R. 158 (1926); [Nedeau v. United Petroleum](#), 251 Mich. 673, 232 N.W. 202 (1930).

6 [Kresberg v. International Paper Co.](#), 149 F.2d 911 (C.C.A. 2d Cir. 1945); [Hamilton v. Young](#), 116 Kan. 128, 225 P. 1045, 35 A.L.R. 496 (1924).

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## 13 Am. Jur. 2d Business Trusts § 7

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### Business Trusts

Karen L. Schultz, J.D.

#### I. Definitions and Nature; Validity

#### B. Other Organizations and Relationships Compared and Distinguished

### § 7. Distinction between business trust and partnership; "control test"

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#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3581

Generally, a business trust is not a partnership and the members or shareholders thereof are not partners.<sup>1</sup> However, while there are essential differences between a business trust and an ordinary partnership,<sup>2</sup> certain courts have held that business trusts are partnerships and that the members or shareholders thereof are treated as partners.<sup>3</sup>

The question whether a trust instrument gives rise to a partnership or to a true business trust depends upon such elements as an intention or agreement of the parties to share losses and to become partners and not merely or exclusively upon their right to participate in profits.<sup>4</sup> The criterion most frequently applied in determining whether an organization in the form of a Massachusetts or business trust is, in legal effect, a true trust or a partnership, and which is particularly applied in determining whether or not shareholders are liable as partners for the debts of the trust, is the "control test," which is formulated as whether, under the declaration of trust, the trustees act as principals and are free from the control of certificate holders.<sup>5</sup> In other words, the more power the beneficial interests have over the affairs of the business association, the more likely it is that the association is a partnership rather than a trust.<sup>6</sup> When the trust instrument designates the trustees merely managing agents and not principals, the organization will be treated as a partnership,<sup>7</sup> and this result follows, although the control is to be exercised by and through a business manager where he is the agent of the beneficiaries for this purpose.<sup>8</sup>

#### Practice Tip:

Under the control test, control is measured by the potential residing in the shareholders under the terms of the trust instrument rather than by the degree to which it has been actually exerted.<sup>9</sup>



Under a state's Uniform Partnership Act, a business trust is a person that may associate with other persons in a partnership.<sup>10</sup>

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#### Footnotes

- 1 [Crocker v. Malley](#), 249 U.S. 223, 39 S. Ct. 270, 63 L. Ed. 573, 2 A.L.R. 1601 (1919); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [City Bank Farmers Trust Co. v. Graves](#), 272 N.Y. 1, 3 N.E.2d 612, 108 A.L.R. 333 (1936).
- 2 [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).  
In an ordinary partnership, membership is limited to those people selected by the individual partners for their personal qualifications, a new partner cannot be introduced without the consent of the other partners, and the death of a partner dissolves the partnership; but none of these characteristics are applicable to a business trust with transferable shares. [State Street Trust Co. v. Hall](#), 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 (1942).  
As to nature of partnerships, generally, see [Am. Jur. 2d, Partnership](#) §§ 1 to 11.
- 3 [Wiley v. W.J. Hoggson Corp.](#), 90 Fla. 343, 106 So. 408 (1925); [Ing v. Liberty Nat. Bank](#), 216 Ky. 467, 287 S.W. 960 (1926); [American Nat. Bank of Shreveport v. Reclamation Oil Producing Ass'n of Louisiana](#), 156 La. 652, 101 So. 10 (1924); [Means v. Limpia Royalties](#), 115 S.W.2d 468 (Tex. Civ. App. Fort Worth 1938), writ dismissed.  
A growers' cooperative association organized in trust form under a state statute was not a pure trust but was treated as a copartnership business, subject to the requirements of the state's fictitious name statute. [Kadota Fig Ass'n of Producers v. Case-Swayne Co.](#), 73 Cal. App. 2d 796, 167 P.2d 518 (3d Dist. 1946).
- 4 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).  
As to nature of partnerships, generally, see [Am. Jur. 2d, Partnership](#) §§ 1 to 11.
- 5 [Hecht v. Malley](#), 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924); [F.P.P. Enterprises v. U.S.](#), 830 F.2d 114 (8th Cir. 1987).  
As to powers and functions of trustees of business trust, see §§ 38 to 45.
- 6 [In re Medallion Realty Trust](#), 120 B.R. 245 (D. Mass. 1990).
- 7 [Neville v. Gifford](#), 242 Mass. 124, 136 N.E. 160 (1922).  
The true test of such a trust is to determine whether the relation between the parties is that of principal and agent or trustee and beneficiary, and whether the subscribers are separated from direct interest, ownership, and control of the property and affairs of the trust. [Brown v. Bedell](#), 263 N.Y. 177, 188 N.E. 641 (1934).
- 8 [Engineering Service Corp. v. Longridge Inv. Co.](#), 153 Cal. App. 2d 404, 314 P.2d 563 (2d Dist. 1957).
- 9 [Simson v. Klipstein](#), 262 F. 823 (D.N.J. 1920) (applying New Jersey law); [Goubeaux v. Krickenberger](#), 126 Ohio St. 302, 185 N.E. 201 (1933); [Marchulonis v. Adams](#), 97 W. Va. 517, 125 S.E. 340 (1924).  
As to trust instrument in business trusts, see § 10.
- 10 [Han v. Hallberg](#), 35 Cal. App. 5th 621, 247 Cal. Rptr. 3d 526 (2d Dist. 2019), review granted, see [cal. rules of court 8.1105 and 8.1115](#), 250 Cal. Rptr. 3d 720, 446 P.3d 234 (Cal. 2019).

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## 13 Am. Jur. 2d Business Trusts § 8

American Jurisprudence, Second Edition | May 2021 Update

### Business Trusts

Karen L. Schultz, J.D.

#### I. Definitions and Nature; Validity

#### B. Other Organizations and Relationships Compared and Distinguished

### § 8. Distinction between business trust and joint-stock company

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3550](#), [3551](#), [3580](#), [3581](#)

The Massachusetts or business trust is sometimes treated as an unincorporated joint-stock association,<sup>1</sup> though it is more often held not to be a joint-stock company or association.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Loomis Land & Cattle Company v. Diversified Mortgage Investors](#), 533 S.W.2d 420 (Tex. Civ. App. Tyler 1976), writ refused n.r.e., (June 9, 1976); [Grenco Real Estate Inv. Trust v. Brooker](#), 215 Va. 413, 211 S.E.2d 33 (1975).

<sup>2</sup> As to joint-stock company distinguished from business trust, see [Am. Jur. 2d, Joint-Stock Companies](#) § 2. [Crocker v. Malley](#), 249 U.S. 223, 39 S. Ct. 270, 63 L. Ed. 573, 2 A.L.R. 1601 (1919); [Betts v. Hackathorn](#), 159 Ark. 621, 252 S.W. 602, 31 A.L.R. 847 (1923); [Bouchard v. First People's Trust](#), 253 Mass. 351, 148 N.E. 895 (1925).

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## 13 Am. Jur. 2d Business Trusts § 9

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### Business Trusts

Karen L. Schultz, J.D.

### II. Creation, Organization, and Duration

## § 9. Creation and formation of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

Massachusetts or business trusts are created by the act and agreement of the parties and do not depend upon statutory law for their validity.<sup>1</sup> A trust of this nature generally is established by the execution of a trust instrument by one or more trustees who hold or will receive the corpus of the trust, setting forth the terms of the trust, details of the organization, and the manner of conducting business.<sup>2</sup> A "business trust" is a type of business formation comprising an arrangement whereby property is actually conveyed to a trustee, who holds and/or manages the same for the benefit of the holders of transferable certificates issued by the trustee; such a relationship exists by reason of a trust instrument and the participants.<sup>3</sup> A declaration of trust and a business trust's bylaws are a contract between the trustees of the trust and the shareholders that defines the rights of the trust's shareholders.<sup>4</sup> Although the business of the trust usually is managed by the trustees in whom is vested the title to the trust property, for the benefit of the holders of transferable certificates of beneficial interest, sometimes the management is vested in other persons named as officers or as a board.<sup>5</sup>

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### Footnotes

- 1 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Morriss v. Finkelstein](#), 127 S.W.2d 46 (Mo. Ct. App. 1939).  
As to nature and attributes of business trusts, see § 2.  
As to validity of business trusts, see § 3.
- 2 [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).
- 3 [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019).
- 4 [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).

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[American Ry. Exp. Co. v. Asher](#), 218 Ky. 172, 291 S.W. 21 (1927).

As to powers and functions of trustees of business trust, see §§ [38](#) to [45](#).

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## 13 Am. Jur. 2d Business Trusts § 10

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### Business Trusts

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### II. Creation, Organization, and Duration

## § 10. Trust instrument forming business trust; construction, recordation, and amendment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

### Forms

Forms relating to declaration of business trust, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

A business trust is formed under, or on the basis of, an instrument or declaration of trust which must conform to statutory and other requirements relating to trusts.<sup>1</sup> No special form need be followed in creating a Massachusetts or business trust, and it is even possible to create such a trust without the use of the word "trust" or "trustee" where the intention to do so appears from the instrument as a whole.<sup>2</sup> The trust instrument should, however, embody all the elements necessary to constitute a business trust; there should be an unequivocal declaration of trust, a vesting of title in named trustees, a description of the character of the business to be carried on, an outline of the powers and duties of the trustees, provisions for the tenure and election of trustees, and for the issuance of certificates of beneficial interest and the transfer thereof, with a statement of the rights of shareholders with respect to profits and dividends.<sup>3</sup> If desired, there may be provisions fixing the term and duration of the trust and limiting or negating the liability of shareholders and trustees to third persons.<sup>4</sup>

In construing a business trust instrument, the intention of the parties, as expressed in the instrument, governs.<sup>5</sup> Words in a declaration of a common-law business trust will be construed in accordance with their usual, common, and ordinary meaning and the plain meaning of such language controls, even though the drafters may have placed a different construction on it.<sup>6</sup> While ordinary deeds of trust are construed strictly in order to afford the maximum protection to the beneficiaries, instruments creating business trusts are to be construed as analogous to a corporate charter and as broadly interpreted, so far as concerns

the powers of the trustees.<sup>7</sup> An express provision of the trust instrument that the rights and duties of the several parties will be determined according to the law of the state of the domicile of the persons creating the trust has been given effect in determining these matters,<sup>8</sup> as has a provision that the trustees will have the power to construe the instrument and that their construction will be final and conclusive.<sup>9</sup>

An authorized recording of a business trust instrument constitutes notice to persons dealing with the trust.<sup>10</sup> However, the recording of the trust instrument does not give constructive notice of the contents thereof to parties dealing with the trust where the instrument is not required or entitled to be recorded.<sup>11</sup>

The power to amend the business trust instrument or to change the terms of the trust depends upon the provisions of that instrument, which will usually provide for the amendment of the trust by the trustees or by the shareholders, or by the former with the assent of the latter and in the absence of a provision to the contrary therein the trust instrument cannot be modified or amended except with the consent of all the parties.<sup>12</sup> Where a business trust instrument explicitly provides for the power and method of modification, such power must be exercised in strict conformity to its terms.<sup>13</sup>

**Observation:**

It is appropriate that a business trust instrument should be capable of amendment to reflect changing conditions and to promote the efficient operation of the trust in the achievement of trust purposes.<sup>14</sup>

Where trust managers seek the approval of the shareholders of a proposed amendment to the trust instrument, they owe the duty of a full and fair disclosure of all pertinent facts to the shareholders.<sup>15</sup> An amendment to a business trust which is adopted by the unauthorized consent of a beneficiary is void and of no effect.<sup>16</sup>

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**Footnotes**

- 1 [Hecht v. Malley](#), 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924); [Catholic School Employees Pension Trust](#), 599 B.R. 634 (B.A.P. 1st Cir. 2019); [Goldwater v. Olman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).  
Trusts, which were invalid because the settlor did not own the real property conveyed to the trust and because the taxpayers who owned the property did not sign the trust instruments and did not comply with the applicable statute of frauds, were invalid as business trusts. [F.P.P. Enterprises v. U.S.](#), 646 F. Supp. 713 (D. Neb. 1986), judgment aff'd, 830 F.2d 114 (8th Cir. 1987).
- 2 [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).  
A settlor's attempt at the creation of a common-law business trust, even if imperfect, would nevertheless result in the creation of some "entity," the rest of which was excludable from the settlor's bankruptcy estate. [In re Carriage House, Inc.](#), 146 B.R. 352 (D. Vt. 1992).  
A revocable inter vivos trust established by settlors to support them during their lifetime and distribute property remaining after their death to their three children and their grandchildren did not qualify as a

"business trust" pursuant to statute, absent evidence of the intent to create such a trust. [Ovrevik v. Ovrevik](#), 242 Ga. App. 95, 527 S.E.2d 586 (2000).

3 [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992).

As to powers and functions of trustees of business trust, see §§ 38 to 45.

As to designation or elections of trustees and term of office, see § 34.

As to shares and certificates in business trust, see §§ 15 to 19.

As to rights of shareholders of business trust, see §§ 22, 23.

4 [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992).

5 [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992); [Thomle v. Soundview Pulp Co.](#), 181 Wash. 1, 42 P.2d 19 (1935).

6 [Wisconsin Real Estate Inv. Trust v. Weinstein](#), 712 F.2d 1095 (7th Cir. 1983).

7 [Bomeisler v. M. Jacobson & Sons Trust](#), 118 F.2d 261 (C.C.A. 1st Cir. 1941).

As to corporate charters, generally, see [Am. Jur. 2d, Corporations](#) §§ 72 to 95.

8 [Liberty Nat. Bank & Trust Co. in New York v. New England Investors Shares](#), 25 F.2d 493 (D. Mass. 1928).

9 [Lambach v. Anderson](#), 228 Iowa 1173, 293 N.W. 505 (1940).

10 [Roy v. First Eastern Bank](#), 781 F. Supp. 821 (D. Mass. 1992) (applying Massachusetts law).

11 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Hunter v. Winter](#), 268 Ill. App. 487, 1932 WL 2664 (1st Dist. 1932); [Continental Supply Co. v. Adams](#), 272 S.W. 325 (Tex. Civ. App. Fort Worth 1925), writ refused, (Oct. 21, 1925).

The specific statutory requirements governing the filing declarations of business trusts and their annual reports provide the public with a reasonable means of obtaining information of such trusts. Likewise, recording the trust agreement in the registry of deeds places upon that record the terms of such a trust sufficiently to apprise purchasers of the trustees' powers; but in the absence of a specific statutory requirement that a certificate of the issue of shares of such a trust be recorded in the registry of deeds, no such obligation to record exists by implication, and such recording is not essential to a showing upon the record that the trust exists. [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).

12 [Dunbar v. Redfield](#), 7 Cal. 2d 515, 61 P.2d 744 (1936); [Fogelin v. Nordblom](#), 402 Mass. 218, 521 N.E.2d 1007 (1988).

The amendment of an instrument creating a Massachusetts business trust so as to provide for majority control was not invalid on the ground that it impermissibly deprived the trustees of a testamentary trust, which included as its principal asset shares of the business trust, of their power and duty to control the operation of the business trust and accordingly the majority of the business trustees could validly act to bind the trust. [Richardson v. Clarke](#), 372 Mass. 859, 364 N.E.2d 804 (1977).

13 [Fogelin v. Nordblom](#), 402 Mass. 218, 521 N.E.2d 1007 (1988).

The trustees could not lawfully adopt a bylaw restricting the transferability of trust shares in a way different from and more stringent than that expressly provided by the trust declaration. [Pacific Realty Trust v. APC Investments, Inc.](#), 59 Or. App. 425, 651 P.2d 163 (1982).

14 [Richardson v. Clarke](#), 372 Mass. 859, 364 N.E.2d 804 (1977).

15 [Shapiro v. Chicago Title & Trust Co.](#), 328 Ill. App. 650, 66 N.E.2d 731 (1st Dist. 1946).

As to duties of trustee of business trust to shareholders, see §§ 46 to 49.

16 [Fogelin v. Nordblom](#), 402 Mass. 218, 521 N.E.2d 1007 (1988) (custodians of minor beneficiary's preferred shares were without authority to consent to amendment).

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## 13 Am. Jur. 2d Business Trusts § 11

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### Business Trusts

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### II. Creation, Organization, and Duration

## § 11. Name of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

The business trust normally derives its name from the declaration of trust, although the trustees may be given the authority to select a name for the organization for business purposes.<sup>1</sup> In the absence of a statute prohibiting it, a business trust may adopt and carry on business and make contracts under an assumed name or trade name.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Hamilton v. Young](#), 116 Kan. 128, 225 P. 1045, 35 A.L.R. 496 (1924); [Schwartz v. Abbott Motors, Inc.](#), 344 Mass. 28, 181 N.E.2d 334 (1962).

<sup>2</sup> [Hamilton v. Young](#), 116 Kan. 128, 225 P. 1045, 35 A.L.R. 496 (1924); [Hodgkiss v. Northland Petroleum Consol.](#), 104 Mont. 328, 67 P.2d 811 (1937).

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## 13 Am. Jur. 2d Business Trusts § 12

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### Business Trusts

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### II. Creation, Organization, and Duration

## § 12. Bylaws of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

### Forms

Forms relating to trustee bylaw or regulation, see Am. Jur. Legal Forms 2d, Business Trusts; Am. Jur. Legal Forms 2d, Real Estate Investment Trusts and Syndications [[Westlaw®\(r\) Search Query](#)]

Business trusts sometimes operate under bylaws similar to those adopted by corporations to govern the details of corporate affairs.<sup>1</sup> A court interprets a business trust's bylaws according to traditional principles of contract law.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [First Nat. Bank of New Bedford v. Chartier](#), 305 Mass. 316, 25 N.E.2d 733 (1940).  
As to bylaws of corporations, generally, see [Am. Jur. 2d, Corporations §§ 252 to 277](#).
- <sup>2</sup> [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).  
As to construction of trust instruments in business trusts, see [§ 10](#).

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## 13 Am. Jur. 2d Business Trusts § 13

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### Business Trusts

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### II. Creation, Organization, and Duration

## § 13. Purpose or business of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

### Forms

Forms relating to business trust purpose, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

There is nothing inherent in the business trust to prevent it from carrying on any kind of lawful business activity that individuals, partnerships, or corporations might engage in,<sup>1</sup> as is evident from a consideration of the wide variety of business pursuits for which business trusts have been organized.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [Weber Engine Co. v. Alter](#), 120 Kan. 557, 245 P. 143, 46 A.L.R. 158 (1926).  
As to purposes of corporations, generally, see [Am. Jur. 2d, Corporations](#) §§ 158 to 164.
- <sup>2</sup> [Helfering v. Coleman-Gilbert Associates](#), 296 U.S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935) (operation and management of apartment houses); [Helfering v. Combs](#), 296 U.S. 365, 56 S. Ct. 287, 80 L. Ed. 275 (1935) (oil well development); [Morrissey v. Commissioner of Internal Revenue](#), 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935) (construction and operation of golf course); [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930) (production of motion pictures); [Schwartz v. Abbott Motors, Inc.](#), 344 Mass. 28, 181 N.E.2d 334 (1962) (business of making loans, with or without security); [Wm. Lindeke Land Co. v. Kalman](#),

190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934) (restaurant business); *Memorial Park v. Vaughn*, 1942 OK 147, 191 Okla. 50, 126 P.2d 711 (1942) (cemetery business).

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## 13 Am. Jur. 2d Business Trusts § 14

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### Business Trusts

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### II. Creation, Organization, and Duration

## § 14. Duration of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3584

The duration of a business trust may properly be and generally is specified by the terms of the instrument of trust,<sup>1</sup> and the operation of the trust cannot be extended over the objection of a shareholder.<sup>2</sup> However, in the absence of statute,<sup>3</sup> there is no legal necessity for limiting the term of a business trust; it generally is held that a business trust which is to continue for an indefinite period does not violate the rule against perpetuities nor that against restraints on alienation since these rules are directed solely against the remoteness of vesting and the suspension or withholding of the power of alienation, and all interests provided for in the property of such a trust vest immediately and may be conveyed or transferred by the owners of them.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930).
- <sup>2</sup> [Hauser v. Catlett](#), 1946 OK 262, 197 Okla. 668, 173 P.2d 728 (1946).
- <sup>3</sup> [Hauser v. Catlett](#), 1946 OK 262, 197 Okla. 668, 173 P.2d 728 (1946).
- <sup>4</sup> [Hodgkiss v. Northland Petroleum Consol.](#), 104 Mont. 328, 67 P.2d 811 (1937); [Baker v. Stern](#), 194 Wis. 233, 216 N.W. 147, 58 A.L.R. 462 (1927).

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## 13 Am. Jur. 2d Business Trusts § 15

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### Business Trusts

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### III. Shares and Certificates

## § 15. Shares and certificates of business trust

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3585

### A.L.R. Library

[Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704](#)

The proportional equitable ownership interest of each cestui que trust in a business trust is usually evidenced by a certificate known as a share, stock share, certificate, or receipt.<sup>1</sup> The absence of transferable certificates of beneficial interest demonstrates that at least for some purposes, a business organization cannot be deemed to be a business or Massachusetts trust,<sup>2</sup> though there is authority to the contrary.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Wilchfort v. Knight](#), 307 F. Supp. 3d 64 (E.D. N.Y. 2018) (applying Virginia law); [Catholic School Employees Pension Trust](#), 599 B.R. 634 (B.A.P. 1st Cir. 2019); [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).

A "business trust" is a type of business formation comprising an arrangement whereby property is actually conveyed to a trustee, who holds and/or manages the same for the benefit of the holders of transferable certificates issued by the trustee. [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019).

As to nature and attributes of business trusts, see [§ 2](#).

- 2                    [Associated Cemetery Management, Inc. v. Barnes](#), 268 F.2d 97 (8th Cir. 1959); [Denmark Cheese Assn. v. Hazard Adv. Co.](#), 33 A.D.2d 761, 305 N.Y.S.2d 1019 (1st Dep't 1969).  
A business entity organized in the trust format but which did not issue shares or certificates of beneficial interest was not a true business trust under a statute declaring that one of the attributes of a business trust is the issuance of such shares or certificates. [Limouze v. M. M. and P. Maritime Advancement, Training, Ed. and Safety Program](#), 397 F. Supp. 784 (D. Md. 1975).
- 3                    [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992) (trust not voidable for failure to actually issue certificates).

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## 13 Am. Jur. 2d Business Trusts § 16

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### Business Trusts

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### III. Shares and Certificates

## § 16. Classes of shares in business trust; participation agreements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3585

As in the case of corporations, business trusts may be empowered to issue preferred as well as common stock, to issue more than one class of either type, and to issue no-par shares.<sup>1</sup> Business trusts organized for the purpose of producing oil sometimes issue, in addition to the ordinary trust shares, participating agreements entitling the holders to a certain share of the oil produced.<sup>2</sup> The distinction between such participation agreements and ordinary certificates of beneficial interest will be observed by the courts.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Morrissey v. Commissioner of Internal Revenue](#), 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Bouchard v. First People's Trust](#), 253 Mass. 351, 148 N.E. 895 (1925).
- As to classes of stock of corporations, generally, see [Am. Jur. 2d, Corporations §§ 353 to 361](#).
- <sup>2</sup> [Schiffman v. Richfield Oil Co. of Cal.](#), 8 Cal. 2d 211, 64 P.2d 1081 (1937).
- <sup>3</sup> [Schiffman v. Richfield Oil Co. of Cal.](#), 8 Cal. 2d 211, 64 P.2d 1081 (1937) (a reference to such participation agreements by the owner thereof in a pleading as "certificates" and as "beneficial interests in said trusts" will not preclude him from asserting that the agreements are not certificates of beneficial interest).

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## 13 Am. Jur. 2d Business Trusts § 17

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### Business Trusts

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### III. Shares and Certificates

## § 17. Subscription or purchase of shares in business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3585

### A.L.R. Library

[Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations, 11 A.L.R.2d 1380](#)

The trustees of a business trust usually are given the power to receive subscriptions to shares in the trust and to sell and issue such shares.<sup>1</sup> In a jurisdiction regarding business trusts as being in the nature of corporations, a sale of shares is not the equivalent of doing business within the intendment of a statute requiring foreign corporations to qualify in a certain manner before doing business within the state.<sup>2</sup> However, shares of a business trust have been held to be within the operation of a statute prescribing certain conditions for the sale of stock of any corporation, company, or association.<sup>3</sup> The trustees may maintain an action to recover the amount due on subscriptions to shares or at least so much thereof as is necessary to enable the trustees to satisfy obligations incurred by them on the strength of the subscriptions.<sup>4</sup> Also, in like manner, a creditor of a business trust may maintain a suit in equity to require the trustees to collect and the subscribers to pay amounts due and unpaid on subscription agreements, under the theory that subscriptions to capital stock of the business trust are capital assets which, upon insolvency of the trust, constitute a trust fund for the payment of its debts.<sup>5</sup> Such a suit will not be abated because the statute of limitations has run on subscribers' notes evidencing the unpaid portions of their subscriptions since the action is founded on the subscribers' continuing obligation to pay their agreed portions of the capital of the trust rather than on the notes given as evidence of their obligations.<sup>6</sup> Whether or not the trustees of a business trust have the right to repurchase the trust's own shares depends upon the terms of the trust instrument and such a repurchase, for the purpose of cancellation, is not improper.<sup>7</sup>



Upon a proper showing of fraud inducing a subscription, a subscriber to shares in a business trust may rescind the subscription and recover the amount paid, or may maintain an action for damages.<sup>8</sup> By electing to sue for damages, the subscriber is thereafter precluded from rescinding the contract of subscription.<sup>9</sup> The subscriber may, of course, waive any fraud inducing the purchase the shares and may ratify the contract of subscription,<sup>10</sup> but he cannot speculate upon the success of the venture by waiting until events disclose whether or not it will be to his interest to rescind.<sup>11</sup> In the absence of fraud or misrepresentation, a subscriber cannot hold a promoter liable for the amount paid for shares in the trust merely because the project fails.<sup>12</sup> When a statute prohibits a business trust from engaging in business without making certain filings, the sale of shares of beneficial interest in such a trust is a violation of law, and there can be no recovery on a check given to purchase such shares.<sup>13</sup>

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#### Footnotes

- 1 [Yeaman v. Galveston City Co.](#), 106 Tex. 389, 167 S.W. 710 (1914).
- 2 [Home Lumber Co. v. Hopkins](#), 107 Kan. 153, 190 P. 601, 10 A.L.R. 879 (1920).
- 3 [People v. Clum](#), 213 Mich. 651, 182 N.W. 136, 15 A.L.R. 253 (1921).  
As to subscription for corporate stock, see [Am. Jur. 2d, Corporations § 181](#).
- 4 [Dunbar v. Broomfield](#), 247 Mass. 372, 142 N.E. 148 (1924).
- 5 [Bartelt v. Lehmann](#), 207 S.W.2d 131, 11 A.L.R.2d 1374 (Tex. Civ. App. Austin 1947), writ refused.
- 6 [Bartelt v. Lehmann](#), 207 S.W.2d 131, 11 A.L.R.2d 1374 (Tex. Civ. App. Austin 1947), writ refused.
- 7 [Cohen v. U.S. Trust Securities Corp.](#), 311 Mass. 152, 40 N.E.2d 282 (1942).
- 8 [Wineinger v. Farmers' & Stockmen's Loan & Investment Ass'n](#), 278 S.W. 932 (Tex. Civ. App. Amarillo 1925), writ granted, (Feb. 24, 1926) and [aff'd](#), 287 S.W. 1091 (Tex. Comm'n App. 1926).
- 9 [Cleaves v. Thompson](#), 122 Kan. 43, 251 P. 429 (1926).
- 10 [Cleaves v. Thompson](#), 122 Kan. 43, 251 P. 429 (1926).
- 11 [Moran v. Union Bank of Chicago](#), 266 Ill. App. 315, 1932 WL 2818 (1st Dist. 1932), [aff'd](#), 352 Ill. 503, 186 N.E. 182 (1933).
- 12 [McCrea v. Day](#), 113 Neb. 538, 204 N.W. 56 (1925).
- 13 [Rubens v. Costello](#), 75 Ariz. 5, 251 P.2d 306 (1952).

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## 13 Am. Jur. 2d Business Trusts § 18

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### Business Trusts

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### III. Shares and Certificates

## § 18. Transfer or pledge of shares of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3585

One of the distinctive features of the business trust, as compared to an ordinary trust or a partnership, is the transferability of its shares; it is in no way illegal to provide for transferable shares, and instruments declaring business trusts usually contain such a provision.<sup>1</sup> Statutes prohibiting or restricting the transfer of interests in trusts do not apply to business trusts.<sup>2</sup> It is competent to provide in the trust instrument that the shares of a business trust must be offered to the trustees before being transferred to outsiders.<sup>3</sup> Where this is done and the trustees do not elect to purchase the shares, they may be compelled to transfer the shares to the offeror on their books.<sup>4</sup> If the trustees fail to make a periodic valuation of the shares of the trust as required by the trust instrument as a basis for their acquisition of the shares of a member who dies or withdraws, the court may determine the true value of such shares.<sup>5</sup> When the transferee of trust shares makes false representations which are relied upon by a trust beneficiary in signing a purchase agreement and selling the beneficiary's shares for less than their market value, the purchase agreement can be rescinded.<sup>6</sup>

Shares in a business trust may be pledged by the owner thereof<sup>7</sup> without complying with a provision of the trust instrument requiring a transfer on the records of the trust and the issuance of a new certificate where there has been a transfer of shares.<sup>8</sup>

### Observation:

A shareholder's allegation that real estate investment trusts (REIT) failed to reprice shares given to the shareholders in lieu of cash dividends under a dividend reinvestment program following purchases by unrelated persons, as was required by Securities and Exchange Commission (SEC) forms that provided the manner in which the shares were to be priced, sufficiently alleged a breach of contract as to two of three REITs; the shareholder failed to allege any sales to unrelated parties as to one of the three REITs, but sufficiently alleged that two REITs failed to reprice the shares after tender offers to unrelated persons.<sup>9</sup>

Instruments creating business trusts usually prescribe the manner in which a transfer or assignment of shares is to be effectuated, and these provisions are binding upon purchasers of shares.<sup>10</sup> Failure to follow the procedure prescribed in a declaration of trust for the transfer of certificates of interest results in no interest being transferred.<sup>11</sup> Thus, trust instruments often require that transfers of shares be entered in the books of the trust,<sup>12</sup> and the trustees of a business trust may refrain from transferring certificates on the books of the trust until the procedure prescribed for transfer has been followed and may withhold payment of dividends to the transferees until transfer on the trust books can be made.<sup>13</sup> As between the parties to a transfer of shares unperfected on the books of the trust, however, the transfer is good, and actual knowledge thereof will charge the trustees with liability for dividends paid to the transferor thereafter.<sup>14</sup>

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#### Footnotes

- 1 Catholic School Employees Pension Trust, 599 B.R. 634 (B.A.P. 1st Cir. 2019); *In re Dille Family Trust*, 598 B.R. 179 (Bankr. W.D. Pa. 2019); *Swartz v. Sher*, 344 Mass. 636, 184 N.E.2d 51 (1962); *Peoples Bank v. D'Lo Royalties, Inc.*, 235 So. 2d 257 (Miss. 1970); *Forbes v. Forbes*, 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).  
As to nature and attributes of business trusts, see § 2.
- 2 *Baker v. Stern*, 194 Wis. 233, 216 N.W. 147, 58 A.L.R. 462 (1927) (applying Massachusetts law).
- 3 *Hecht v. Malley*, 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924); *Fairfield Holding Corporation v. Southern*, 258 Mass. 540, 155 N.E. 639 (1927).  
Provided the exercise of the option was timely, an attorney could be divested of his interest in a trust pursuant to an agreement between the attorney and his employer, defendant limited partnership, which provided that if the attorney's employment with the defendant was terminated before a certain date, the defendant could exercise an option to repurchase the attorney's interest in the trust. *Dowling v. Metropolitan Structures*, 20 Ill. App. 3d 507, 314 N.E.2d 523 (1st Dist. 1974).
- 4 *Fairfield Holding Corporation v. Southern*, 258 Mass. 540, 155 N.E. 639 (1927).
- 5 *Dooley v. Resnik*, 256 Mass. 205, 152 N.E. 231 (1926).
- 6 *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 230 Ill. Dec. 55, 692 N.E.2d 1221 (1st Dist. 1998).
- 7 *Lawn Sav. & Loan Ass'n v. Quinn*, 81 Ill. App. 2d 304, 225 N.E.2d 683 (1st Dist. 1967).
- 8 *Snow v. Hogan*, 312 Ill. App. 636, 38 N.E.2d 934 (2d Dist. 1942).
- 9 *Wilchfort v. Knight*, 307 F. Supp. 3d 64 (E.D. N.Y. 2018) (applying Virginia law).
- 10 *New England Merchants Nat. Bank of Boston v. Old Colony Trust Co.*, 385 Mass. 24, 429 N.E.2d 1143, 32 U.C.C. Rep. Serv. 1592, 21 A.L.R.4th 873 (1982); *Peoples Bank v. D'Lo Royalties, Inc.*, 235 So. 2d 257 (Miss. 1970); *Sherard v. Sherard*, 2006 WY 105, 142 P.3d 673 (Wyo. 2006).
- 11 *Peoples Bank v. D'Lo Royalties, Inc.*, 235 So. 2d 257 (Miss. 1970).
- 12 *Sherard v. Sherard*, 2006 WY 105, 142 P.3d 673 (Wyo. 2006).
- 13 *Baar v. Fidelity & Columbia Trust Co.*, 302 Ky. 91, 193 S.W.2d 1011 (1946); *New England Merchants Nat. Bank of Boston v. Old Colony Trust Co.*, 385 Mass. 24, 429 N.E.2d 1143, 32 U.C.C. Rep. Serv. 1592, 21 A.L.R.4th 873 (1982).
- 14 *Baar v. Fidelity & Columbia Trust Co.*, 302 Ky. 91, 193 S.W.2d 1011 (1946).

## 13 Am. Jur. 2d Business Trusts § 19

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### Business Trusts

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### III. Shares and Certificates

## § 19. Bequest or inheritance of shares of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3585

Shares in a Massachusetts or business trust may be bequeathed by the shareholder,<sup>1</sup> and upon the death of a shareholder intestate, his personal representative becomes vested with the right to the shares and the undivided profits.<sup>2</sup>

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### Footnotes

- 1 [Douglass v. Safe Deposit & Trust Co. of Baltimore](#), 159 Md. 81, 150 A. 37 (1930).  
2 [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).

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## 13 Am. Jur. 2d Business Trusts § 20

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### Business Trusts

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#### IV. Shareholders or Members

##### A. Nature and Eligibility

## § 20. Nature of shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587

### A.L.R. Library

[Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704](#)

Certificate holders in a conventional business trust stand in their relation to the trust much as do stockholders to a corporation, and they are not creditors of the trust but equitable owners of proportional interests in the trust property.<sup>1</sup> A "Massachusetts trust" is a form of business organization consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided; these certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.<sup>2</sup> However, the relationship is somewhat different where the business trust is treated as a partnership since the shareholders then may be said to have a direct interest in the affairs of the trust.<sup>3</sup> Shareholders are charged with notice of the provisions of the trust instrument and become bound by those provisions on the purchase of shares.<sup>4</sup>

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#### Footnotes

- 1                   Selected Inv. Corp. v. Duncan, 260 F.2d 918 (10th Cir. 1958).  
As to rights, duties, and interests of shareholders in corporations, generally, see Am. Jur. 2d, Corporations §§ 615 to 634.
- 2                   Catholic School Employees Pension Trust, 599 B.R. 634 (B.A.P. 1st Cir. 2019); Forbes v. Forbes, 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 3                   Stephenson v. Kirkham, 297 S.W. 265 (Tex. Civ. App. San Antonio 1927), writ refused, (Nov. 2, 1927).  
As to rights and duties of partners, generally, see Am. Jur. 2d, Partnership §§ 269, 270.
- 4                   George v. Hall, 262 S.W. 174 (Tex. Civ. App. San Antonio 1924).  
As to trust instrument in business trusts, see § 10.

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## 13 Am. Jur. 2d Business Trusts § 21

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### Business Trusts

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#### IV. Shareholders or Members

##### A. Nature and Eligibility

### § 21. Eligibility of shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587

While an unincorporated voluntary association which is not a legal entity cannot hold title to shares in a business trust,<sup>1</sup> there appears to be no reason why one business trust may not become a shareholder in another such trust.<sup>2</sup> Also, where business trusts are treated as true trusts rather than as partnerships, no inherent reason is apparent why a corporation may not hold shares of such a trust as well as the shares of another corporation; however, particular statutory or charter provisions may prevent a corporation from holding shares in a business trust.<sup>3</sup>

#### Observation:

A "captive real estate investment trust (REIT)" is a business structure in which a corporation owns a holding company which in turn owns a real estate investment trust.<sup>4</sup>

Trustees of a business trust are not disqualified from being shareholders thereof;<sup>5</sup> in fact, provision for ownership of shares by the trustees frequently is incorporated in trust instruments,<sup>6</sup> although there can be no valid business trust where all of the shareholders are trustees and the trustees and shareholders are identical persons.<sup>7</sup>

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Footnotes

- 1 [Comstock v. Dewey](#), 323 Mass. 583, 83 N.E.2d 257 (1949).
- 2 [Greco v. Hubbard](#), 252 Mass. 37, 147 N.E. 272 (1925).
- 3 [Attorney General v. New York, N.H. & H.R. Co.](#), 198 Mass. 413, 84 N.E. 737 (1908).
- 4 [HMN Financial, Inc. v. Commissioner of Revenue](#), 782 N.W.2d 558 (Minn. 2010).
- 5 [Henry G. Taussig Co. v. Poindexter](#), 224 Mo. App. 580, 30 S.W.2d 635 (1930).  
As to eligibility to serve as trustee of business trust, see § 32.
- 6 [Rhode Island Hospital Trust Co. v. Copeland](#), 39 R.I. 193, 98 A. 273 (1916).
- 7 As to validity of, and efficacy as, business trust, see § 3.

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## 13 Am. Jur. 2d Business Trusts § 22

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### Business Trusts

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#### IV. Shareholders or Members

##### B. Rights and Powers

### § 22. Rights and powers of shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587 to 3590

#### Forms

Forms relating to being bound by trust agreement, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

The provisions of the declaration of trust are binding upon the shareholders of a business trust and determine their rights.<sup>1</sup> The extent and manner of exercise of the shareholders' right to vote on the affairs of a business trust may be, and frequently are, governed by the terms of the trust instrument<sup>2</sup> and in this connection, the propriety of making provision for voting by proxy has been recognized.<sup>3</sup> The right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership, as the ability of shareholders to nominate and elect different trustees is a crucial means for shareholders to prevent the entrenchment of poorly performing trustees.<sup>4</sup> In determining their rights, the courts apply by analogy the rules governing the rights of stockholders in corporations so far as the rules of equity will permit.<sup>5</sup> The owner of shares of beneficial interest in a business trust has the right to examine the records of the trustee which is analogous to the right of a corporation's shareholder to examine corporate records.<sup>6</sup>

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#### Footnotes

- 1                    [Todd v. Ford](#), 92 Colo. 392, 21 P.2d 173 (1933); [Hardee v. Adams Oil Ass'n](#), 254 S.W. 602 (Tex. Civ. App. Galveston 1923).
- A declaration of trust and a business trust's bylaws are a contract between the trustees of the trust and the shareholders that defines the rights of the trust's shareholders. [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 2                    [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 3                    [Comstock v. Dewey](#), 323 Mass. 583, 83 N.E.2d 257 (1949).
- As to trust instrument in business trusts, see § 10.
- 4                    [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 5                    [Wineinger v. Farmers' & Stockmen's Loan & Investment Ass'n](#), 278 S.W. 932 (Tex. Civ. App. Amarillo 1925), writ granted, (Feb. 24, 1926) and aff'd, 287 S.W. 1091 (Tex. Comm'n App. 1926).
- Where provisions of business trust bylaws are unclear, a court resolves any doubt in favor of the stockholders' electoral rights. [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 6                    [Wallace v. Malooly](#), 4 Ill. 2d 86, 122 N.E.2d 275 (1954); [Application of Kroese](#), 18 A.D.2d 909, 238 N.Y.S.2d 56 (1st Dep't 1963).

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## 13 Am. Jur. 2d Business Trusts § 23

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### Business Trusts

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### IV. Shareholders or Members

### B. Rights and Powers

## § 23. Proprietary interests of shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587 to 3590

The proprietary interests of shareholders are subject to the terms of the trust instrument.<sup>1</sup> Their rights in the property of the trust depend upon the title actually acquired by the trustees and are subject to the defects in the title of the trustees even though such defects do not appear of record and the shareholders have no notice thereof.<sup>2</sup> Where the legal title to the trust property is vested in the trustees, the shareholders have an equitable interest in the property.<sup>3</sup> Shareholders, even after the termination of the period provided as the lifetime of the trust, do not have any such interest in the real property of the trust as will enable them to maintain an action of trespass to try title.<sup>4</sup> In the absence of a provision in the trust instrument granting them that power, they have no authority to contract for the sale of trust lands.<sup>5</sup> After the expiration of the term of a business trust and while the trustees still are empowered to wind up its affairs, title to the real property of the trust does not vest in the shareholders.<sup>6</sup> Instruments creating business trusts often contain provisions expressly denying shareholders the right to a partition, and even in the absence of such a provision, it is held that they have no such right prior to the termination or dissolution of the trust.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [State Street Trust Co. v. Hall](#), 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 (1942).
- <sup>2</sup> [Bisbee v. Mackey](#), 215 Mass. 21, 102 N.E. 327 (1913).  
As to acquisition of trust property by trustees of business trust, see § 43.
- <sup>3</sup> [R.F.C. v. Goldberg](#), 143 F.2d 752 (C.C.A. 7th Cir. 1944); [Goodhue v. State St. Trust Co.](#), 267 Mass. 28, 165 N.E. 701 (1929).
- <sup>4</sup> [Kountze v. Smith](#), 135 Tex. 543, 144 S.W.2d 261 (Comm'n App. 1940).
- <sup>5</sup> [Spotswood v. Morris](#), 12 Idaho 360, 85 P. 1094 (1906).

- 6 [In re Mullendore's Estate, 1956 OK 81, 297 P.2d 1094 \(Okla. 1956\).](#)  
As to termination and dissolution of business trust, see §§ [73](#), [74](#).
- 7 [Aronson v. Olsen, 348 Ill. 26, 180 N.E. 565 \(1932\).](#)

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## 13 Am. Jur. 2d Business Trusts § 24

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### Business Trusts

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#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

###### 1. Liability of Shareholders

### § 24. Basis for liability of shareholders of business trust for acts and debts of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

#### Forms

Forms relating to liability, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

The status of a business trust for the purpose of determining the liability of the shareholders depends upon who has the power of control over the business and property of the trust and if the ultimate power of control is vested in the trustees, who also hold the legal title to the trust property, the organization is treated as a true trust rather than as a partnership, and the shareholders are not liable for the debts or contractual obligations incurred by the trustees.<sup>1</sup> If the shareholders, however, have the power of effectual control over the trustees or over the affairs of the trust, the shareholders' liability is not limited.<sup>2</sup> In some jurisdictions the shareholders of a business trust are liable for the debts of the trust, irrespective of the question of their control over the affairs of the trust.<sup>3</sup> Even in a jurisdiction where, by statute, shareholders are generally exempt from personal liability for the debts of the trust, persons who associate for the purpose of forming a business trust but who fail to perfect the trust can be held personally liable for trust obligations.<sup>4</sup>

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#### Footnotes

- 1                    [Outlaw v. U. S.](#), 204 Ct. Cl. 152, 494 F.2d 1376 (1974) (applying Georgia law); [Commercial Cas. Ins. Co. v. North](#), 320 Ill. App. 221, 50 N.E.2d 434 (2d Dist. 1943); [Rossman v. Marsh](#), 287 Mich. 580, 283 N.W. 696 (1939), adhered to on reh'g, 287 Mich. 720, 286 N.W. 83 (1939); [In re Winter's Estate](#), 133 N.J. Eq. 245, 31 A.2d 769 (Prerog. Ct. 1943), decree aff'd by, 136 N.J. Eq. 112, 40 A.2d 648 (Ct. Err. & App. 1945).  
A business trust is treated as a corporation for purposes of bestowing limited liability on its shareholders. [Minkin v. Commissioner of Revenue](#), 40 Mass. App. Ct. 345, 664 N.E.2d 851 (1996), rev'd on other grounds, 425 Mass. 174, 680 N.E.2d 27 (1997).  
As to control test, generally, see § 7.  
As to nature and degree of control sufficient to impose liability on shareholders of business trust, see § 26.
- 2                    [Rand v. Morse](#), 289 F. 339 (C.C.A. 8th Cir. 1923) (applying Missouri law); [Bank of America Nat. Trust & Savings Ass'n v. Scully](#), 92 F.2d 97 (C.C.A. 10th Cir. 1937) (applying California law); [Minkin v. Commissioner of Revenue](#), 40 Mass. App. Ct. 345, 664 N.E.2d 851 (1996), rev'd on other grounds, 425 Mass. 174, 680 N.E.2d 27 (1997).  
A beneficiary of a business trust which was the prospective vendor of real property at the time a contract of sale was entered into, who later became the sole beneficiary and the sole trustee, was personally liable for the obligations of the trust arising out of the contract. [Federal Deposit Ins. Corp. v. Slinger](#), 913 F.2d 7 (1st Cir. 1990).
- 3                    [Burk-Waggoner Oil Ass'n v. Hopkins](#), 269 U.S. 110, 46 S. Ct. 48, 70 L. Ed. 183 (1925) (applying Texas law); [Weber Engine Co. v. Alter](#), 120 Kan. 557, 245 P. 143, 46 A.L.R. 158 (1926); [Ing v. Liberty Nat. Bank](#), 216 Ky. 467, 287 S.W. 960 (1926); [Looney v. Wing](#), 195 S.W.2d 557 (Tex. Civ. App. Fort Worth 1946), dismissed.
- 4                    [Hollis v. O.A. Steiner Tire Co.](#), 1926 OK 291, 122 Okla. 190, 247 P. 66 (1926); [Hausam v. Ticor Title Ins. Co.](#), 99 Or. App. 533, 783 P.2d 39 (1989).

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## 13 Am. Jur. 2d Business Trusts § 25

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### Business Trusts

Karen L. Schultz, J.D.

#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

###### 1. Liability of Shareholders

## § 25. Liability of shareholders of business trust for torts of the trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

The shareholders of a Massachusetts or business trust are personally liable for the torts of the trust where they are vested with ultimate and effectual control over the business and property of the trust.<sup>1</sup>

### Observation:

Tort liability, it is to be noted, depends upon the power of control and not upon the actual exercise of the power.<sup>2</sup>

Shareholders in a business trust who authorize and direct the trustee to commit a wrongful act are liable in damages to the injured person.<sup>3</sup>

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### Footnotes

- 1                      *Roller v. Madison*, 172 Ky. 693, 189 S.W. 914 (1916); *Marchulonis v. Adams*, 97 W. Va. 517, 125 S.E. 340 (1924).
- 2                      *Marchulonis v. Adams*, 97 W. Va. 517, 125 S.E. 340 (1924).
- 3                      *Piff v. Berresheim*, 405 Ill. 617, 92 N.E.2d 113 (1950).

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## 13 Am. Jur. 2d Business Trusts § 26

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### Business Trusts

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#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

###### 1. Liability of Shareholders

### § 26. Nature and degree of control sufficient to impose liability on shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

The fact that the agreement on its face provides for managers and not for trustees is significant on but not conclusive of the question whether the instrument creates a true trust or a partnership or agency.<sup>1</sup> The determination whether the shareholders have such effectual control of the organization as will render them personally liable as partners in a partnership generally depends upon no single element of control but upon a combination of factors, such as—

- the co-ownership of assets.<sup>2</sup>
- an agreement for profit and loss sharing.<sup>3</sup>
- the free transferability of the entity's beneficial interests.<sup>4</sup>
- the carrying on of a business rather than engaging in a single transaction.<sup>5</sup>
- the power of the shareholders to amend or terminate the trust.<sup>6</sup>

As a general rule, the reservation to the shareholders of a business trust of the power to elect trustees at stated intervals and to fill vacancies among the trustees resulting from death, resignation, or expiration of term of office does not alone transform the organization into a partnership under the "control" test so as to render the shareholders personally liable for the debts of the trust.<sup>7</sup> The same is true of the power to elect trustees in combination with other powers reserved to the shareholders.<sup>8</sup> The vesting of power in the shareholders to remove or replace trustees does not convert a business trust into a partnership.<sup>9</sup> However,

if the trustees are subject to removal by the shareholders and are dependent upon them for election, the ultimate control of the organization rests in the shareholders so as to render them liable as partners.<sup>10</sup> The power in the shareholders to elect and remove trustees, combined with such other powers as that of amending or terminating the trust, gives the shareholders such control as to characterize the trust as a partnership.<sup>11</sup>

Circumstances held insufficient to impose partnership liability on shareholders include—

— the mere power of the shareholders to hold meetings.<sup>12</sup>

— the power of the shareholders to hold occasional conferences about the affairs of the trust between the trustees and a shareholder who has no power of control.<sup>13</sup>

— the appointment by the trustees of an advisory board of shareholders where the trustees do not relinquish control over the affairs of the trust.<sup>14</sup>

— the right to fix or control the minimum sale price of lots vested by the declaration of trust in the shareholders.<sup>15</sup>

The mere reservation to the shareholders of a business trust of the power to amend the trust instrument does not, of itself, convert the organization into a partnership so as to render the shareholders liable for the debts of the trust.<sup>16</sup> However, the power to amend the trust instrument or to terminate the trust, in addition to other powers reserved to the shareholders, may render them liable as partners for the debts of the trust.<sup>17</sup>

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## Footnotes

- 1 [Brown v. Bedell](#), 263 N.Y. 177, 188 N.E. 641 (1934).  
A provision of the trust agreement that the subscribers irrevocably nominate and constitute the managers their agents and attorneys to do and perform all things necessary to carry out the contract does not necessarily indicate a relationship of partners or principal and agent, so as to render the shareholders liable for the debts of the trust, where the instrument as a whole indicates an intention to create a business trust. [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).  
As to control test, generally, see § 7.  
As to basis for liability of shareholders of business trust for acts and debts of business trust, see § 24.
- 2 [In re Medallion Realty Trust](#), 120 B.R. 245 (D. Mass. 1990).
- 3 [In re Medallion Realty Trust](#), 120 B.R. 245 (D. Mass. 1990).  
An entity could not be characterized as a business trust where it did not authorize the carrying on of business for profit. [F.P.P. Enterprises v. U.S.](#), 830 F.2d 114 (8th Cir. 1987).
- 4 [F.P.P. Enterprises v. U.S.](#), 830 F.2d 114 (8th Cir. 1987).  
As to transfer of shares or certificates of business trust, see § 18.
- 5 [In re Medallion Realty Trust](#), 120 B.R. 245 (D. Mass. 1990).
- 6 [Liquid Carbonic Co. v. Sullivan](#), 1924 OK 819, 103 Okla. 78, 229 P. 561 (1924); [Marchulonis v. Adams](#), 97 W. Va. 517, 125 S.E. 340 (1924).  
As to amendment of trust instruments for business trusts, see § 10.  
As to termination or dissolution of business trusts, see §§ 73, 74.
- 7 [Gutelius v. Stanbon](#), 39 F.2d 621 (D. Mass. 1929) (applying Florida law); [Levy v. Nellis](#), 284 Ill. App. 228, 1 N.E.2d 251 (1st Dist. 1936).  
As to election of trustees of business trust, see § 34.
- 8 [Levy v. Nellis](#), 284 Ill. App. 228, 1 N.E.2d 251 (1st Dist. 1936).
- 9 [Downey Co. v. Whistler](#), 284 Mass. 461, 188 N.E. 243 (1933).

As to removal of trustees of business trust, see § 37.

10 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930).

11 [First Nat. Bank of New Bedford v. Chartier](#), 305 Mass. 316, 25 N.E.2d 733 (1940) (shareholders given the power to elect officers and directors at annual elections, to remove any officer and fill the vacancy thus created, to hold annual meetings, and with the approval of the board of directors, to amend the trust instrument); [Feldman v. American Dist. Telegraph Co.](#), 257 S.W. 929 (Tex. Civ. App. San Antonio 1924) (power in the shareholders to amend the trust agreement and to elect the trustees).

As to amendment of trust instruments for business trusts, see § 10.

As to termination or dissolution of business trusts, see §§ 73, 74.

12 [Levy v. Nellis](#), 284 Ill. App. 228, 1 N.E.2d 251 (1st Dist. 1936).

13 [Greco v. Hubbard](#), 252 Mass. 37, 147 N.E. 272 (1925).

14 [Krey Packing Co. v. Hitchings](#), 18 S.W.2d 123 (Mo. Ct. App. 1929).

15 [Rossman v. Marsh](#), 287 Mich. 580, 283 N.W. 696 (1939), adhered to on reh'g, 287 Mich. 720, 286 N.W. 83 (1939).

16 [Levy v. Nellis](#), 284 Ill. App. 228, 1 N.E.2d 251 (1st Dist. 1936); [In re Winter's Estate](#), 133 N.J. Eq. 245, 31 A.2d 769 (Prerog. Ct. 1943), decree aff'd by, 136 N.J. Eq. 112, 40 A.2d 648 (Ct. Err. & App. 1945).

17 [Hollister v. McCamey](#), 115 Tex. 49, 274 S.W. 562 (1925) (power in the shareholders to amend the declaration of trust and to authorize an increase in the capital stock).

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## 13 Am. Jur. 2d Business Trusts § 27

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### Business Trusts

Karen L. Schultz, J.D.

#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

##### 2. Provisions of Trust Instrument or Contract Negating or Limiting Liability

### § 27. Validity of provisions of business trust instrument or contract negating or limiting liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

A provision of a trust instrument that provides that persons dealing with the trustees will look only to the trust fund and property and that the shareholders will not be personally liable is not contrary to law or public policy.<sup>1</sup> In a jurisdiction where the shareholders of a business trust are held personally liable for the debts of the trust, irrespective of the question of power of control, a provision of the trust instrument purporting to exempt them from liability is ineffectual, at least in the absence of notice to the creditor of the provision.<sup>2</sup> According to this view, the members of such a trust cannot confer immunity upon themselves by their own contract.<sup>3</sup> In a jurisdiction following the doctrine that a business trust is, in legal contemplation, a partnership in the nature of a joint-stock company, notwithstanding that exclusive control is vested in the trustees, a provision of the trust instrument purporting to exempt the shareholders from liability for the debts incurred by the trustees on behalf of the trust is invalid and ineffectual where there is no compliance with a statute relating to the formation of limited partnerships with respect to a creditor who deals with the trustees with knowledge of the terms of the trust instruments but without expressly agreeing to look only to the assets of the trust.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927); [Loomis Land & Cattle Company v. Diversified Mortgage Investors](#), 533 S.W.2d 420 (Tex. Civ. App. Tyler 1976), writ refused n.r.e., (June 9, 1976).  
As to trust instrument in business trusts, see § 10.

- 2                    [Weber Engine Co. v. Alter](#), 120 Kan. 557, 245 P. 143, 46 A.L.R. 158 (1926).  
As to liability of shareholders of business trust for trust debts and obligations, see §§ 24 to 26.  
As to the effect of such notice, see § 28.
- 3                    [Linn v. Houston](#), 123 Kan. 409, 255 P. 1105 (1927).
- 4                    [Thompson v. Schmitt](#), 115 Tex. 53, 274 S.W. 554 (1925).  
As to joint-stock company distinguished from business trust, see [Am. Jur. 2d, Joint-Stock Companies § 2](#).

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## 13 Am. Jur. 2d Business Trusts § 28

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### Business Trusts

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#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

##### 2. Provisions of Trust Instrument or Contract Negating or Limiting Liability

### § 28. Effect of notice or lack of notice on validity of provisions of business trust instrument or contract negating or limiting liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

Where shareholders would otherwise be personally liable for the debts of the trust, a provision of the trust instrument purporting to exempt them from such liability does not relieve them of liability to creditors having no notice of such provision.<sup>1</sup> On the other hand, persons dealing with the trustees or officers of a business trust with notice of a provision of the trust instrument purporting to exempt the shareholders from personal liability for any debt or liability incurred by the trustees or on any contract made by them on behalf of the trust cannot recover against the shareholders personally.<sup>2</sup>

A mere reference to the declaration of trust or a recital that the contract is made by the trustees pursuant thereto is sufficient to charge the contracting party with notice of a provision of the declaration purporting to exempt the shareholders from personal liability.<sup>3</sup> The statement by an officer of the trust, at the time of entering into a contract on behalf of the trust, that the organization is not a corporation and that he "thought" it was a partnership is sufficient to put the other contracting party upon inquiry as to the nature of the organization and the relationship of the members thereof.<sup>4</sup> However, the fact that the president of the creditor bank is one of the organizers of the trust does not charge the bank with notice of limitations in the trust instrument upon the personal liability of the shareholders.<sup>5</sup>

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#### Footnotes

- 1 [Hunter v. Winter, 268 Ill. App. 487, 1932 WL 2664 \(1st Dist. 1932\); Ing v. Liberty Nat. Bank, 216 Ky. 467, 287 S.W. 960 \(1926\).](#)

As to liability of shareholders of business trust for trust debts and obligations, see §§ 24 to 26.

As to validity of provisions of business trust instrument or contract negating or limiting liability, see § 27.

2 Farmers' & Merchants' Nat. Bank of Fort Worth, Tex. v. Anderson, 216 Iowa 988, 250 N.W. 214 (1933);  
Dunning v. Gibbs, 213 Ky. 81, 280 S.W. 483 (1926); Darling v. Buddy, 318 Mo. 784, 1 S.W.2d 163, 58  
A.L.R. 493 (1927); Roberts v. Aberdeen-Southern Pines Syndicate, 198 N.C. 381, 151 S.E. 865, 71 A.L.R.  
885 (1930).

3 Bank of Topeka v. Eaton, 100 F. 8 (C.C.D. Mass. 1900), *aff'd*, 107 F. 1003 (C.C.A. 1st Cir. 1901).

4 Darling v. Buddy, 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).

5 Ing v. Liberty Nat. Bank, 216 Ky. 467, 287 S.W. 960 (1926).

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## 13 Am. Jur. 2d Business Trusts § 29

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### Business Trusts

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#### IV. Shareholders or Members

##### C. Liability to Third Parties for Trust Debts and Obligations

##### 2. Provisions of Trust Instrument or Contract Negating or Limiting Liability

### § 29. Contractual limitations, recitals, and references negating or limiting liability of shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3591, 3592

Generally and even in a jurisdiction holding ineffectual a mere provision of a trust instrument purporting to exempt shareholders from personal liability for the debts of the trust, it is competent for the trustees and persons dealing with them to stipulate for the exemption of the shareholders from liability; where the creditor agrees that the shareholders will not be personally liable, no recovery can be had against them.<sup>1</sup> Such an agreement is valid and binding and violates no public policy.<sup>2</sup> It is not necessary to exempt the shareholders from liability that the agreement to this effect be expressly stated; the agreement and understanding to this effect may be implied in fact from the circumstances.<sup>3</sup>

#### Practice Tip:

Parol evidence is admissible to show an agreement or understanding between the contracting parties that shareholders will not be personally liable on an obligation executed by the officers of the trust.<sup>4</sup>



In other jurisdictions, a mere reference in a contract to the trust instrument is sufficient to exempt shareholders from personal liability on the contract where the trust instrument contained a provision to the effect that the shareholders should not be liable.<sup>5</sup>

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Footnotes

- 1 [Farmers' State Bank & Trust Co. v. Gorman Home Refinery, 3 S.W.2d 65 \(Tex. Comm'n App. 1928\).](#)
- 2 [Shelton v. Montoya Oil & Gas Co., 292 S.W. 165 \(Tex. Comm'n App. 1927\).](#)
- 3 [Farmers' State Bank & Trust Co. v. Gorman Home Refinery, 3 S.W.2d 65 \(Tex. Comm'n App. 1928\).](#)
- 4 [Shelton v. Montoya Oil & Gas Co., 292 S.W. 165 \(Tex. Comm'n App. 1927\).](#)
- 5 [Bank of Topeka v. Eaton, 100 F. 8 \(C.C.D. Mass. 1900\), aff'd, 107 F. 1003 \(C.C.A. 1st Cir. 1901\).](#)  
Shareholders are not liable on a note executed by the trustees, purporting to exempt them from liability and referring to a trust instrument containing a provision that the sharers should not be liable where they have no power of control. [Levy v. Nellis, 284 Ill. App. 228, 1 N.E.2d 251 \(1st Dist. 1936\).](#)

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## 13 Am. Jur. 2d Business Trusts § 30

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### Business Trusts

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#### IV. Shareholders or Members

##### D. Rights and Liabilities Among Shareholders

### § 30. Effect of trust provisions regarding rights and liabilities of shareholders of business trust among each other

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587, 3590

Where only the rights of shareholders and trustees among themselves are involved, the court will, as far as possible, give effect to the provisions of the trust instrument.<sup>1</sup> As between the parties to the trust instrument, a provision therein exempting the shareholders from personal liability is valid and binding.<sup>2</sup> Such a provision is binding upon the shareholders who are charged with knowledge thereof,<sup>3</sup> and the same is true as between the shareholders and an officer<sup>4</sup> or trustee of such a trust.<sup>5</sup> The trustees cannot for their own benefit or protection assert the liability of shareholders where such liability results from the failure of the trustees to perform their duty to insert in a contract made by them a provision exempting the shareholders from liability.<sup>6</sup>

The shareholders of a business trust do not bear any contractual or fiduciary relationship among themselves,<sup>7</sup> though the actions by one beneficiary may create a fiduciary relationship as to the other beneficiaries.<sup>8</sup> It is competent for the trust instrument to provide against any fiduciary relationship as between shareholders.<sup>9</sup>

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#### Footnotes

- <sup>1</sup> [Hossack v. Ottawa Development Ass'n](#), 244 Ill. 274, 91 N.E. 439 (1910).  
Where a real estate trust agreement stated that a beneficiary was entitled to a lien against the interest of the other beneficiary only when there was a default under the agreement, and the agreement only required a beneficiary to make such payments as were needed to satisfy a purchase money mortgage, the beneficiary was not entitled to a lien against the interest of the other beneficiary under the terms of the agreement for

the other beneficiary's failure to make payments other than those payments necessary to satisfy the purchase money mortgage. [Waters v. Sundstrom](#), 386 So. 2d 54 (Fla. 2d DCA 1980).

As to trust instrument in business trusts, see § 10.

2        [State ex rel. Great American Home Sav. Institution v. Lee](#), 288 Mo. 679, 233 S.W. 20 (1921); [Barnett v. Cisco Banking Co.](#), 253 S.W. 339 (Tex. Civ. App. El Paso 1923), writ refused, (Oct. 17, 1923).

3        [Hardee v. Adams Oil Ass'n](#), 254 S.W. 602 (Tex. Civ. App. Galveston 1923).

4        [Oden v. Bone](#), 263 S.W. 640 (Tex. Civ. App. San Antonio 1924).

5        [George v. Hall](#), 262 S.W. 174 (Tex. Civ. App. San Antonio 1924).

6        [Barnett v. Cisco Banking Co.](#), 253 S.W. 339 (Tex. Civ. App. El Paso 1923), writ refused, (Oct. 17, 1923).

7        [Krensky v. De Swarte](#), 335 Ill. App. 435, 82 N.E.2d 168 (1st Dist. 1948).

8        [Regas v. Danigeles](#), 54 Ill. App. 2d 271, 203 N.E.2d 730 (1st Dist. 1964) (a land-trust beneficiary's unilateral termination of a cooperative method of carrying on the business with two cobeneficiaries and his general blocking of the cobeneficiaries from knowledge of the facts about the business).

9        [Krensky v. De Swarte](#), 335 Ill. App. 435, 82 N.E.2d 168 (1st Dist. 1948).

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## 13 Am. Jur. 2d Business Trusts § 31

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### Business Trusts

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### IV. Shareholders or Members

### D. Rights and Liabilities Among Shareholders

## § 31. Contribution among shareholders of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3587, 3590

Where the shareholders of a business trust are personally liable for the debts of the trust, one of them who has been required to pay such a debt may enforce contribution from the other shareholders.<sup>1</sup> The estate of a deceased shareholder is liable for contribution on account of a debt incurred and paid after his death.<sup>2</sup> Where contribution is sought for a judgment paid by a shareholder in another state, shareholders who were not parties to that action are not included.<sup>3</sup> The right to contribution may, of course, be affected by equities among the shareholders themselves; if their liability resulted from the personal fault or neglect of the shareholder seeking contribution, the other shareholders cannot be compelled to contribute.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Phillips v. Blatchford](#), 137 Mass. 510, 1884 WL 10641 (1884).
- <sup>2</sup> [Phillips v. Blatchford](#), 137 Mass. 510, 1884 WL 10641 (1884).
- <sup>3</sup> [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).
- <sup>4</sup> [Mims v. Stephens County-Ranger Oil Co.](#), 268 S.W. 1014 (Tex. Civ. App. Fort Worth 1924).

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## 13 Am. Jur. 2d Business Trusts V A Refs.

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### Business Trusts

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### V. Trustees, Officers, and Agents

#### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

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A.L.R. Index, Business Trusts

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## 13 Am. Jur. 2d Business Trusts § 32

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### Business Trusts

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### V. Trustees, Officers, and Agents

#### A. In General

## § 32. Eligibility to serve as trustee of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

### A.L.R. Library

[Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704](#)

Generally speaking and in the absence of statutory restrictions, any natural person has the capacity to take and hold property in a trust to the extent the person has the capacity to take and hold the property as a beneficial owner.<sup>1</sup> Subject to the limitations placed upon its powers by its own charter or by statute, a corporation<sup>2</sup> or a bank may hold property in trust and may act as the trustee of a business trust.<sup>3</sup> The ownership of shares in the business trust does not disqualify one from becoming a trustee,<sup>4</sup> although there can be no valid business trust where all of the shareholders are trustees and the trustees and shareholders are identical persons.<sup>5</sup>

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### Footnotes

- <sup>1</sup> As to designation or election of trustee of business trust, see § 34.  
As to who may serve as trustee, generally, see [Am. Jur. 2d, Trusts § 208](#).
- <sup>2</sup> [Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N.E. 439 \(1910\)](#).
- <sup>3</sup> [James Stewart & Co. v. National Shawmut Bank of Boston, 69 F.2d 694 \(C.C.A. 1st Cir. 1934\)](#) (applying Massachusetts law); [Baker v. Stern, 194 Wis. 233, 216 N.W. 147, 58 A.L.R. 462 \(1927\)](#) (trust company).

- 4                      [Commercial Cas. Ins. Co. v. North](#), 320 Ill. App. 221, 50 N.E.2d 434 (2d Dist. 1943); [Henry G. Taussig Co. v. Poindexter](#), 224 Mo. App. 580, 30 S.W.2d 635 (1930).
- 5                      As to validity of, and efficacy as, business trust, see [§ 3](#).

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## 13 Am. Jur. 2d Business Trusts § 33

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### Business Trusts

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### V. Trustees, Officers, and Agents

#### A. In General

## § 33. Status of trustees of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

In making contracts for the trust estate, in conducting its business and in holding and managing its property, the trustees act as principals and not as agents or representatives of the shareholders.<sup>1</sup> The fact that the individuals having charge of the management of the business and property of the trust are designated "managers" does not prevent their being treated as trustees,<sup>2</sup> nor does the mere use of the term "trustees" necessarily fix the legal status of the persons to whom it is applied as trustees, as distinguished from partners.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Loring v. U.S.](#), 80 F. Supp. 781 (D. Mass. 1948); [Palmer v. Taylor](#), 168 Ark. 127, 269 S.W. 996 (1925); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).
- <sup>2</sup> [Byrnes v. Chase Nat. Bank](#), 225 A.D. 102, 232 N.Y.S. 224 (1st Dep't 1928), [aff'd](#), 251 N.Y. 551, 168 N.E. 423 (1929).
- <sup>3</sup> [Continental Supply Co. v. Adams](#), 272 S.W. 325 (Tex. Civ. App. Fort Worth 1925), writ refused, (Oct. 21, 1925).

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## 13 Am. Jur. 2d Business Trusts § 34

American Jurisprudence, Second Edition | May 2021 Update

### Business Trusts

Karen L. Schultz, J.D.

### V. Trustees, Officers, and Agents

#### A. In General

## § 34. Designation or election of trustees of business trust; term of office

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

### Forms

Forms relating to election, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

The trust instruments should contain provisions as to the election of trustees, their term of office, and the appointment or election of successors and where the trustees and the shareholders are given concurrent power to appoint trustees to fill vacancies, the exercise of the power by either group deprives the other group of the power to make an appointment for that particular vacancy.<sup>1</sup> The right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership; the ability of shareholders to nominate and elect different trustees is a crucial means for shareholders to prevent the entrenchment of poorly performing trustees.<sup>2</sup> When a declaration of trust provides procedures for adding a trustee, such procedures must be followed in order for designated persons to become trustees.<sup>3</sup>

### Practice Tip:

A court of equity has jurisdiction to entertain a suit to confirm the title of a duly elected or appointed trustee and to compel the cotrustees to recognize the legality of the plaintiff's claim to that office.<sup>4</sup>

The appointment of a managing trustee of a business trust is not invalidated by a failure to notify certificate holders and other trustees of such an appointment.<sup>5</sup>

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#### Footnotes

- 1 [Lambach v. Anderson](#), 228 Iowa 1173, 293 N.W. 505 (1940).  
The by laws of a business trust precluded the holders of common stock from nominating candidates for a fund trustee election, and therefore, the trust manager was not required to recognize a holder of common stock's nomination of two trustee candidates. Pursuant to the trust's by laws, only preferred shareholders were allowed to vote in an election to fill the two open trustee positions. While the trust's by laws did not specifically state that holders of common stock could not nominate election candidates, the by laws expressly gave preferred shareholders the exclusive right to nominate and elect a majority of trustees to protect their interests. [Karpus Management, Inc. v. Putnam Mun. Opportunities Trust](#), 27 Mass. L. Rptr. 86, 2010 WL 2089264 (Mass. Super. Ct. 2010).  
As to trust instrument in business trusts, see § 10.
- 2 [Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund](#), 466 Mass. 368, 995 N.E.2d 64 (2013).
- 3 [In re Carriage House, Inc.](#), 120 B.R. 754 (Bankr. D. Vt. 1990), opinion aff'd, 146 B.R. 352 (D. Vt. 1992).
- 4 [Lambach v. Anderson](#), 228 Iowa 1173, 293 N.W. 505 (1940).
- 5 [860 Lake Shore Drive Trust v. Gerber](#), 19 Ill. App. 2d 1, 153 N.E.2d 253 (1st Dist. 1958).

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## 13 Am. Jur. 2d Business Trusts § 35

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### V. Trustees, Officers, and Agents

#### A. In General

## § 35. Compensation of trustees of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

### Forms

Forms relating to compensation, see Am. Jur. Legal Forms 2d, Business Trusts [[Westlaw®\(r\) Search Query](#)]

Instruments creating business trusts usually make provision for compensation of the trustees, in which case the rights of the trustees with respect to their own compensation are governed by the terms of the trust instrument.<sup>1</sup> A provision in a trust instrument for the allowance of a certain percentage of the profits of the trust business as compensation to the trustee does not disqualify him from acting as a trustee.<sup>2</sup> Under a trust instrument authorizing the trustees to receive such compensation for their services as they deem reasonable, it is not improper for them to pay themselves a reasonable commission on shares of the trust sold by them.<sup>3</sup> However, a provision of the trust instrument entitling the trustees to compensation from the trust estate does not give them a lien in receivership proceedings for the value of their services superior to that of a mortgage on trust property executed by them.<sup>4</sup>

In the absence of a provision in the trust instrument fixing the compensation of the trustee of a business trust, the trustee is entitled to reasonable compensation for services,<sup>5</sup> and an agreement will be implied to pay the trustee a reasonable compensation out of the trust funds for services rendered to the trust.<sup>6</sup> What amounts to reasonable compensation depends, of course, upon all the circumstances, and the fact that trustees or managers are also beneficiaries does not affect their claim for services.<sup>7</sup> The

compensation of trustees of a business trust who are performing the usual duties of such trustees is not subject to social security contributions because the trustees cannot be deemed employees.<sup>8</sup>

**Practice Tip:**

The reasonableness of fees paid to trustees of a business trust under provisions of the declaration of trust is subject to judicial review under equitable powers of the court to guard against spoliation and waste of the funds of the trust.<sup>9</sup>

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**Footnotes**

- 1 Wisconsin Real Estate Inv. Trust v. Weinstein, 712 F.2d 1095 (7th Cir. 1983); Todd v. Ford, 92 Colo. 392, 21 P.2d 173 (1933).  
As to trust instrument in business trusts, see § 10.
- 2 Walker v. Close, 98 Fla. 1103, 125 So. 521 (1929).
- 3 Dunbar v. Redfield, 7 Cal. 2d 515, 61 P.2d 744 (1936).
- 4 Warburton v. Perkins, 150 Md. 304, 133 A. 141 (1926).  
As to receivership of business trust, see § 75.
- 5 Mitchell v. Ormond, 282 Mass. 107, 184 N.E. 471 (1933).
- 6 Trust No. 5522 and Trust No. 5644, Bellehurst Syndicate v. Commissioner of Internal Revenue, 83 F.2d 801 (C.C.A. 9th Cir. 1936) (applying California law); Woodke v. Procknow, 238 Wis. 422, 300 N.W. 173 (1941).
- 7 Trust No. 5522 and Trust No. 5644, Bellehurst Syndicate v. Commissioner of Internal Revenue, 83 F.2d 801 (C.C.A. 9th Cir. 1936) (applying California law); Todd v. Ford, 92 Colo. 392, 21 P.2d 173 (1933).
- 8 Loring v. U.S., 80 F. Supp. 781 (D. Mass. 1948).
- 9 Saminsky v. Abbott, 40 Del. Ch. 528, 185 A.2d 765 (1961).

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## 13 Am. Jur. 2d Business Trusts § 36

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### Business Trusts

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### V. Trustees, Officers, and Agents

#### A. In General

## § 36. Right of trustees of business trust to reimbursement or indemnity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

### Forms

Forms relating to reimbursement, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

Where a trustee of a business trust has acted in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements and liabilities out of the trust estate in his hands, and for this purpose, he is entitled to a credit for expenditures on his account.<sup>1</sup> In order to be entitled to reimbursement for expenses incurred on behalf of the trust estate, the trustee must make a definite showing of the amount and of the constituent items of the claim.<sup>2</sup> However, unless the trustee has exercised good faith and common prudence, property of the trust estate cannot be used to reimburse the trustee for losses or expenses.<sup>3</sup> Thus, the right of a trustee to reimbursement or indemnity is lost where his personal liability results from his failure to insert, as required by the trust instrument, a provision exempting the shareholders and trustees from personal liability.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Taylor v. Mayo](#), 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884); [Austin v. Parker](#), 317 Ill. 348, 148 N.E. 19 (1925).
- <sup>2</sup> [Consolidated American Royalty Corp. v. Taliaferro](#), 78 F.2d 802 (C.C.A. 10th Cir. 1935) (applying Oklahoma law).

3 [Austin v. Parker, 317 Ill. 348, 148 N.E. 19 \(1925\).](#)

4 [Downey Co. v. 282 Beacon St. Trust, 292 Mass. 175, 197 N.E. 643 \(1935\); Mims v. Stephens County-Ranger Oil Co., 268 S.W. 1014 \(Tex. Civ. App. Fort Worth 1924\).](#)

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## 13 Am. Jur. 2d Business Trusts § 37

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### Business Trusts

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### V. Trustees, Officers, and Agents

#### A. In General

## § 37. Resignation, removal, or replacement of trustee of business trust; death or disability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

### Forms

Forms relating to resignation or removal, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

Although it is said that a trustee who has once accepted and entered upon the execution of an ordinary trust cannot resign or renounce the trust without the consent of the cestui que trust or of the court, the instrument creating the trust may give trustees the right to resign; where the trust instrument gives trustees of a business trust the right to resign at will, they do not violate their duty by entering into a contract to sell their interest in the trust and to resign as trustees so that others may be elected trustees in succession.<sup>1</sup>

Generally, trustees are subject to removal for cause at the instance of the shareholders.<sup>2</sup> However, removal of trustees usually will not be grounded on a mere error of judgment or conduct even though there is a technical breach of the trust, if the trust estate does not suffer.<sup>3</sup> Also, hostility between the trustee and the beneficiaries of the trust alone is insufficient to require the removal of the trustee. To be sufficient to require removal of a trustee, the hostility between a trustee and beneficiary must interfere with the proper administration of the trust.<sup>4</sup>

Where the trust agreement provides that the trustees will hold office until it becomes vacant on account of death, inability to act, or resignation, the trustees have no power to remove one of their number so long as he attends the meetings and does not resign.<sup>5</sup> However, a court of equity has the power to remove the trustees of a business trust upon a proper showing of fraud

or unfitness and to appoint other trustees in their stead even though the trust instrument does not reserve to the shareholders the power to remove trustees.<sup>6</sup>

The death of a trustee of a business trust ends his interests under the trust agreement.<sup>7</sup> Upon the death of the trustee of a business trust and the failure of the proper persons to appoint a successor, a court of equity may appoint a successor with the same powers and duties as the original trustees, and the trustee thus appointed by the court takes title to the trust property, subject to the same conditions and equities to which it was subject in the hands of the original trustee.<sup>8</sup>

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#### Footnotes

- 1 [Wright v. Webb](#), 169 Ark. 1145, 278 S.W. 355 (1925).  
As to trust instrument in business trusts, see § 10.
- 2 [Friedman v. Gorin](#), 359 Mass. 745, 269 N.E.2d 246 (1971); [Plymouth Securities Co. v. Johnson](#), 335 S.W.2d 142 (Mo. 1960).
- 3 [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 4 [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 5 [Oklahoma Fullers Earth Co. v. Evans](#), 1937 OK 79, 179 Okla. 124, 64 P.2d 899 (1937).
- 6 [Phoenix Oil Co. v. McLarren](#), 244 S.W. 830 (Tex. Civ. App. Fort Worth 1922); [Burnett v. Smith](#), 240 S.W. 1007 (Tex. Civ. App. Fort Worth 1922).
- 7 [Stewart v. Solomon](#), 316 Pa. 236, 175 A. 498 (1934).
- 8 [Rossman v. Marsh](#), 287 Mich. 580, 283 N.W. 696 (1939), adhered to on reh'g, 287 Mich. 720, 286 N.W. 83 (1939).

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## 13 Am. Jur. 2d Business Trusts V B Refs.

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## 13 Am. Jur. 2d Business Trusts § 38

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### B. Powers and Functions

###### 1. In General

### § 38. Source of powers of trustee of business trust

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#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

The powers of the trustees of a Massachusetts or business trust are measured and limited by the provisions of the declaration of trust<sup>1</sup> and may be implied therefrom.<sup>2</sup> In order to bind the trust estate, the trustees must act within the scope of the powers thus conferred.<sup>3</sup> A person dealing with the trustees of a business trust, knowing them to be such, is bound to ascertain the extent of their power.<sup>4</sup>

Trustees of a business trust retain the power and authority to wind up the affairs of the trust after the expiration of the designated term of its life.<sup>5</sup>

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#### Footnotes

- 1 U. S. v. Crescent-Kelvan Co., 164 F.2d 582 (C.C.A. 3d Cir. 1948); Savit v. Chicago Title & Trust Co., 329 Ill. App. 277, 68 N.E.2d 472 (1st Dist. 1946); Johncamp Realty, Inc. v. Sanders, 98 Misc. 2d 949, 415 N.Y.S.2d 192 (Sup 1979); Powel v. Rogers, 1950 OK 66, 202 Okla. 525, 216 P.2d 283 (1950); Pacific Realty Trust v. APC Investments, Inc., 59 Or. App. 425, 651 P.2d 163 (1982).
- 2 Gutelius v. Stanbon, 39 F.2d 621 (D. Mass. 1929) (applying Florida law); Walker v. Close, 98 Fla. 1103, 125 So. 521 (1929); Jesseph v. Carroll, 126 Wash. 661, 219 P. 429 (1923).
- 3 Sykes v. Parker, 250 Ill. App. 299, 1928 WL 4146 (1st Dist. 1928), cert. denied; West Side Oil Co. v. McDorman, 244 S.W. 167 (Tex. Civ. App. Amarillo 1922).
- 4 De Witt v. Cabanne, 2 F.2d 322 (C.C.A. 3d Cir. 1924); Downey Co. v. Whistler, 284 Mass. 461, 188 N.E. 243 (1933).

5

[McNeal v. Hauser](#), 1949 OK 243, 202 Okla. 329, 213 P.2d 559 (1949).

As to termination and dissolution of business trusts, see §§ [73](#), [74](#).

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## 13 Am. Jur. 2d Business Trusts § 39

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### B. Powers and Functions

###### 1. In General

### § 39. Manner of functioning by trustees of business trust; unanimous, joint, or individual action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

#### Forms

Forms relating to meetings, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

The trustees of a business trust can act only with unanimous concurrence in the absence of a provision to the contrary in the trust instrument.<sup>1</sup> The trustees can act only as a board assembled and not through the individuals who happen to compose such a board,<sup>2</sup> unless the trust instrument provides otherwise.<sup>3</sup> However, the trust instrument may authorize action by a majority or by a specified number of the trustees.<sup>4</sup> When a trust provides that a majority vote may bind the trust, all the trustees must be consulted and must participate in the business transactions involved in the administration of the trust.<sup>5</sup> The trustees may delegate to one of their number certain duties vested by the trust instrument in the trustees, generally;<sup>6</sup> and may name one of their number the president and general manager of the trust with the power and authority to execute and hypothecate notes;<sup>7</sup> authorization of a single trustee to enter into a contract, under a trust instrument providing that a majority of trustees should rule, may be established or shown indirectly and by the conduct of the parties.<sup>8</sup>

Footnotes

- 1                   Loring v. U.S., 80 F. Supp. 781 (D. Mass. 1948); Williard v. Campbell Oil Co., 77 Mont. 30, 248 P. 219 (1926); Brown v. Donald, 216 S.W.2d 679 (Tex. Civ. App. Fort Worth 1949).  
As to trust instrument in business trusts, see § 10.
- 2                   Williard v. Campbell Oil Co., 77 Mont. 30, 248 P. 219 (1926).
- 3                   Lambach v. Anderson, 228 Iowa 1173, 293 N.W. 505 (1940).
- 4                   Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 P. 601, 10 A.L.R. 879 (1920); Richardson v. Clarke, 372 Mass. 859, 364 N.E.2d 804 (1977).  
Under a declaration of trust, which provided that all transactions in which any trustee had a direct or indirect interest would be required to be approved by a majority of trustees, including a majority of the trustees who were not affiliated with the manager of the trust property, the sale of assets of the real estate investment trust to purchasers required the approval of three of the five trustees where other two trustees who had an interest in the manager of the trust property had an indirect interest in the sale of assets. [Terrydale Liquidating Trust v. Barness](#), 611 F. Supp. 1006 (S.D. N.Y. 1984).
- 5                   Richardson v. Clarke, 372 Mass. 859, 364 N.E.2d 804 (1977).
- 6                   Martin v. Security Nat. Bank of Dallas, 257 S.W. 645 (Tex. Civ. App. Dallas 1923).
- 7                   Martin v. Security Nat. Bank of Dallas, 257 S.W. 645 (Tex. Civ. App. Dallas 1923).
- 8                   De Witt v. Cabanne, 2 F.2d 322 (C.C.A. 3d Cir. 1924).  
As to trustee of business trust's power to enter into contracts, see § 42.

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## 13 Am. Jur. 2d Business Trusts § 40

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### B. Powers and Functions

###### 1. In General

### § 40. Delegation of powers of trustee of business trust; appointment of officers and agents

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

#### Forms

Forms relating to officers, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

Where the trustees of a business trust are charged with the duty to manage and control the trust business, they cannot divest themselves of that duty.<sup>1</sup> Thus, where absolute control and management of the trust property and business is vested in the trustees, they cannot appoint a general manager to control the affairs of the trust to the exclusion of the trustees themselves.<sup>2</sup> Power vested in a designated officer of the trust to make contracts for the sale of trust lands does not authorize the trustee to delegate to another the power to do so,<sup>3</sup> unless, of course, the delegation is proper under the declaration of trust.<sup>4</sup> Of necessity, however, the trustees may ordinarily delegate ministerial and nondiscretionary duties to others and may employ agents and servants for the performance of acts of this nature.<sup>5</sup> Though the trustees cannot, without the consent of shareholders, appoint agents to represent the shareholders, the shareholders may subsequently ratify or approve an unauthorized appointment of such an agent so as to be bound by the agent's acts.<sup>6</sup>

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#### Footnotes

- 1 [Phoenix Oil Co. v. McLarren](#), 244 S.W. 830 (Tex. Civ. App. Fort Worth 1922).
- 2 [Phoenix Oil Co. v. McLarren](#), 244 S.W. 830 (Tex. Civ. App. Fort Worth 1922).
- 3 [Spotswood v. Morris](#), 12 Idaho 360, 85 P. 1094 (1906).
- As to power to sell land in business trust, see § 43.
- 4 [Vigdor v. Nelson](#), 322 Mass. 670, 79 N.E.2d 288 (1948).
- 5 [Byrnes v. Chase Nat. Bank](#), 225 A.D. 102, 232 N.Y.S. 224 (1st Dep't 1928), *aff'd*, 251 N.Y. 551, 168 N.E. 423 (1929).
- A trustee for a mortgage-backed securitized trust could validly execute a limited power of attorney to a master mortgage servicer that gave the servicer authority to execute additional limited powers of attorney to subservicers, even though a state statute governing powers of attorney to convey or release property and the Uniform Trust Code did not expressly authorize such delegation, since state common law permitted principals to authorize agents to employ or create subagents. [Select Portfolio Servicing, Inc. v. Blevins](#), 494 S.W.3d 510 (Ky. Ct. App. 2016).
- 6 [Hines v. U.S.](#), 90 F.2d 957 (C.C.A. 7th Cir. 1937).

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## 13 Am. Jur. 2d Business Trusts § 41

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### B. Powers and Functions

### 1. In General

## § 41. Ratification or acquiescence by trustees of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

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The trustees may bind the trust by their ratification of an unauthorized act on behalf of the trust.<sup>1</sup> Thus, a contract within the authority of the trustees to make may be adopted by the trustees or a majority of them, although it was not properly executed or was made without formal authority,<sup>2</sup> and the ratification may be by acquiescence and need not be by formal act at a meeting.<sup>3</sup> Ratification by the other trustees of the acts of a single trustee can supply the unanimity required by the trust instrument of the acts of the trustees,<sup>4</sup> and such ratification may be inferred from knowledge of a course of dealing and the failure to object to it.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [National Sur. Co. v. Anacostia Finance Corp.](#), 26 F.2d 985 (App. D.C. 1928).
- <sup>2</sup> [Rand v. Farquhar](#), 226 Mass. 91, 115 N.E. 286 (1917).
- <sup>3</sup> [West Side Oil Co. v. McDorman](#), 244 S.W. 167 (Tex. Civ. App. Amarillo 1922).
- <sup>4</sup> [Bomeisler v. M. Jacobson & Sons Trust](#), 118 F.2d 261 (C.C.A. 1st Cir. 1941) (applying Massachusetts law); [Cabanne v. De Witt](#), 10 F.2d 504 (C.C.A. 3d Cir. 1926) (applying New Jersey law).
- <sup>5</sup> [Bomeisler v. M. Jacobson & Sons Trust](#), 118 F.2d 261 (C.C.A. 1st Cir. 1941) (applying Massachusetts law).

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## 13 Am. Jur. 2d Business Trusts § 42

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### Business Trusts

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#### V. Trustees, Officers, and Agents

#### B. Powers and Functions

#### 2. Particular Powers and Functions

### § 42. Power of business trustees to make contracts and incur debts

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#### West's Key Number Digest

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In the performance of their primary duty to hold and manage the property of the trust, the trustees of a business trust may incur debts and make or ratify contracts binding on themselves personally, and instruments creating such trusts sometimes authorize the trustees to bind the trust estate.<sup>1</sup> The authority to enter into a particular contract may depend upon a construction of the trust instrument and may include the authority to execute a judgment note on behalf of the trust.<sup>2</sup> When an agent acts on behalf of a trust and communicates his or her limited authority to another party to a negotiated contract, there is no breach of contract for the agent's failure to execute and deliver the contract,<sup>3</sup> but a provision of the trust agreement prohibiting expenditures of over a certain sum without the approval of the trustees is not binding on third parties or creditors without notice.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [California Nat. Bank v. El Dorado Lime & Minerals Co.](#), 207 Cal. 676, 279 P. 775 (1929).
- <sup>2</sup> [Inside Scoop, Inc. v. Curry](#), 755 F. Supp. 426 (D.D.C. 1989), order *aff'd*, 923 F.2d 201 (D.C. Cir. 1991); [Smith v. Reisch](#), 329 Ill. App. 45, 67 N.E.2d 304 (3d Dist. 1946).  
As to trust instrument in business trusts, see § 10.
- <sup>3</sup> [Gulf Freeway Lumber Co. v. Houston Inv. Realty Trust](#), 452 S.W.2d 39 (Tex. Civ. App. Houston 14th Dist. 1970).
- <sup>4</sup> [Stitzinger v. Truitt](#), 81 Cal. App. 502, 253 P. 971 (1st Dist. 1927).

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## 13 Am. Jur. 2d Business Trusts § 43

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#### V. Trustees, Officers, and Agents

##### B. Powers and Functions

##### 2. Particular Powers and Functions

### § 43. Power of business trustees to acquire, administrate, and dispose of trust property; leases and encumbrances; sales and conveyances

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

The trustees generally are vested with the legal title to the trust property.<sup>1</sup> A deed to a trust is not invalid because the grantee is designated by the name of the trust without naming the trustees where the trustees are parties to the trust agreement and could thus be identified.<sup>2</sup> The trustees may acquire and hold title to property on behalf of the trust estate even in a jurisdiction denying the right of the shareholders or trustees to relieve themselves of personal liability for the debts of the trust.<sup>3</sup>

Instruments creating a business trust frequently contain provisions expressly authorizing the trustees to lease property of the trust and to obtain property under lease.<sup>4</sup> Where the trustees are vested with full power to sell, convey, and lease the trust property, they may lease such property beyond the term limited for the duration of the trust.<sup>5</sup>

Instruments creating business trusts frequently contain provisions expressly authorizing the trustees to execute mortgages of trust property to secure debts of the trust estate.<sup>6</sup> The authority of a trustee to mortgage, pledge, or otherwise encumber trust property may also arise by implication.<sup>7</sup>

Generally, the trustees of business trusts are given the power to make contracts for the sale of trust lands<sup>8</sup> which need not be conferred in direct or express terms but may be implied from the purposes of the trust.<sup>9</sup> The trustees in whom title and control are vested can convey a marketable title to real property belonging to the trust estate<sup>10</sup> and may sell such property at private sale rather than by public auction.<sup>11</sup> However, subsequent purchasers are charged with notice of limitations contained in the trust instrument upon the power of the trustees with respect to the conveyance of trust property<sup>12</sup> and when a trustee commits

a breach of trust by wrongfully conveying trust property, the shareholder has the right to follow the trust property and have the conveyance set aside.<sup>13</sup> Where contracts for the sale of land are made in the adopted name of the trust by the duly designated managers thereof, the contracts are not subject to the objection that the real vendors are the trustees, that they are undisclosed principals, and that hence, the contracts are unenforceable.<sup>14</sup>

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#### Footnotes

- 1 [In re Dille Family Trust](#), 598 B.R. 179 (Bankr. W.D. Pa. 2019); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Morriss v. Finkelstein](#), 127 S.W.2d 46 (Mo. Ct. App. 1939).
- 2 [Hodgkiss v. Northland Petroleum Consol.](#), 104 Mont. 328, 67 P.2d 811 (1937).
- 3 [Fitch v. United Royalty Co.](#), 143 Kan. 486, 55 P.2d 409 (1936).
- 4 [Crabb v. Commissioner of Internal Revenue](#), 119 F.2d 772 (C.C.A. 5th Cir. 1941), on reh'g, 121 F.2d 1015 (C.C.A. 5th Cir. 1941) (applying Texas law).  
As to trust instrument in business trusts, see § 10.
- 5 [Powell v. Hammon Consol. Gold Fields](#), 8 Alaska 153, 1929 WL 1143 (Terr. Alaska 1929).
- 6 [Daries v. Hart](#), 214 Iowa 1312, 243 N.W. 527 (1932).
- 7 As to powers of trustees, generally, see [Am. Jur. 2d, Trusts §§ 316 to 320, 535 to 539](#).
- 8 [Reffon Realty Corp. v. Adams Land & Bldg. Co.](#), 128 Md. 656, 98 A. 199 (1916); [West Side Oil Co. v. McDorman](#), 244 S.W. 167 (Tex. Civ. App. Amarillo 1922).
- 9 [Walker v. Close](#), 98 Fla. 1103, 125 So. 521 (1929).
- 10 [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).
- 11 [Asher v. Teter](#), 314 Ill. App. 200, 40 N.E.2d 803 (1st Dist. 1942).
- 12 [Page v. Natural Gas & Fuel Co.](#), 35 F.2d 462 (C.C.A. 8th Cir. 1929).
- 13 [Wallace v. Malooly](#), 4 Ill. 2d 86, 122 N.E.2d 275 (1954).
- 14 [Beilin v. Krenn & Dato](#), 350 Ill. 284, 183 N.E. 330 (1932).

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## 13 Am. Jur. 2d Business Trusts § 44

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### Business Trusts

Karen L. Schultz, J.D.

#### V. Trustees, Officers, and Agents

#### B. Powers and Functions

#### 2. Particular Powers and Functions

### § 44. Power of business trustees to make and issue evidences of indebtedness

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

Trustees of business trusts may execute bills and notes binding upon themselves personally and are sometimes expressly given the power to execute such paper binding upon the trust estate.<sup>1</sup> A declaration of trust empowering the trustees to mortgage trust property necessarily carries with it the power to sign and deliver obligations of the trust to secure which the mortgage is given.<sup>2</sup> The failure to comply with a statute requiring that the trust instrument be recorded has been held not to deprive the trustees of the power, conferred upon them by the terms of the trust, to execute promissory notes.<sup>3</sup>

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#### Footnotes

- 1 [Daries v. Hart](#), 214 Iowa 1312, 243 N.W. 527 (1932).
- 2 [Gutelius v. Stanbon](#), 39 F.2d 621 (D. Mass. 1929) (applying Florida law).
- 3 [Gutelius v. Stanbon](#), 39 F.2d 621 (D. Mass. 1929) (applying Florida law).

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## 13 Am. Jur. 2d Business Trusts § 45

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### Business Trusts

Karen L. Schultz, J.D.

#### V. Trustees, Officers, and Agents

#### B. Powers and Functions

#### 2. Particular Powers and Functions

### § 45. Power of business trustees to compromise and settle claims and to bring claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

Under a business trust agreement empowering the trustees to compromise any claims, they may compromise and settle claims or actions against the trust based on torts of the trustees from which the trust estate derived a substantial benefit and may use trust funds in settlement of such claims.<sup>1</sup>

Investment trusts may hold property in their own name, but other powers, such as the power to sue, are vested in the trustee.<sup>2</sup>

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#### Footnotes

- <sup>1</sup> [Alphonzo E. Bell Corp. v. Bell View Oil Syndicate](#), 46 Cal. App. 2d 684, 116 P.2d 786 (1st Dist. 1941).
- <sup>2</sup> [In re Schmeglar](#), 531 B.R. 735 (Bankr. N.D. Ill. 2015), judgment [aff'd](#), 2016 WL 1020322 (N.D. Ill. 2016) (applying New York law).

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## 13 Am. Jur. 2d Business Trusts V C Refs.

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### Business Trusts

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### C. Duties and Liabilities

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596, 3599 to 3603

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## 13 Am. Jur. 2d Business Trusts § 46

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

###### 1. To the Trust and Shareholders

### § 46. Fiduciary duties of trustee to beneficiaries of business trust; prohibition against self-dealing and conflicts of interest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

The relationship between the trustees and beneficiaries of a business trust is fiduciary in nature regardless of whether the organization is classed as a pure trust or as a partnership with respect to the rights of outsiders,<sup>1</sup> and the trustees owe a fundamental duty to act for the promotion of the interests of the shareholders<sup>2</sup> and not to favor one class of shareholders over another.<sup>3</sup> A trustee of a business trust, like a director and officer of a corporation, owes the trust and its investors fiduciary duties of care and loyalty.<sup>4</sup> Acts of a trustee contrary to the best interests of the shareholders are not absolutely void but are voidable at the option of the beneficiaries.<sup>5</sup> However, no fiduciary relationship exists as between the trustees of a business trust and the prospective purchasers of the beneficial interests therein.<sup>6</sup>

The fiduciary relationship existing between the trustees and the beneficiaries of a business trust imposes upon the trustees a duty to act for the beneficiaries and not for themselves in antagonism to the interests of the beneficiaries.<sup>7</sup> The trustee's duty of loyalty prohibits both self-dealing and conflicts of interest; thus, the trustee must neither (1) deal with trust property for the benefit of himself or third parties, nor (2) place himself in a position inconsistent with the interests of the trust.<sup>8</sup>

#### Practice Tip:

Trusts had standing under state law to bring suit against a trustee for alleged breach of duties.<sup>9</sup>

Self-dealing by a trustee or any fiduciary is always suspect, and it is a universal rule of equity that a trustee must not deal with trust property to his or her own advantage without the knowledge or consent of the cestui que trust.<sup>10</sup> A trustee of a business trust may not profit by any transactions in relation to the trust estate at the expense of the beneficiaries<sup>11</sup> nor is he entitled to derive any profit out of the trust, except as lawful compensation.<sup>12</sup> He has no right to dispose of,<sup>13</sup> to encumber,<sup>14</sup> or to use<sup>15</sup> trust property for his own personal benefit nor may he speculate on the possibilities of property of the trust at the expense of the trust.<sup>16</sup> However, the trustee of a business trust is not disloyal merely because he or she has an indirect financial interest in a particular transaction; disloyalty or lack of good faith is demonstrated by evidence that the fiduciary was improperly influenced by personal considerations or benefits not available to other shareholders, generally.<sup>17</sup> The trustee of a business trust is impliedly prohibited from purchasing on his individual account property necessary for the business of the trust or for carrying out the purposes for which it was organized<sup>18</sup> though a trustee may acquire for himself or herself the shares of other shareholders.<sup>19</sup>

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#### Footnotes

- 1 [Ambellu v. Re'ese Adbarat Debre Selam Kidist Mariam](#), 387 F. Supp. 3d 71 (D.D.C. 2019) (applying District of Columbia law); [Fogelin v. Nordblom](#), 402 Mass. 218, 521 N.E.2d 1007 (1988); [Matter of Trust Known as Great Northern Iron Ore Properties](#), 263 N.W.2d 610 (Minn. 1978); [Powel v. Rogers](#), 1950 OK 66, 202 Okla. 525, 216 P.2d 283 (1950).
- 2 [Page v. Natural Gas & Fuel Co.](#), 35 F.2d 462 (C.C.A. 8th Cir. 1929); [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).  
When a sales agent and building supply company, in order to advance their own business with a business trust engaged in land development, financed the purchase of trust shares by the trustee of the business trust, the opportunity to take advantage of financing so offered should have been presented by the trustee to the remaining shareholders of the trust in order that the trust might avail itself thereof if the remaining shareholders desired. [In re Dean's Trust](#), 47 Haw. 629, 394 P.2d 432 (1964).
- 3 [Stender v. Archstone-Smith Operating Trust](#), 910 F.3d 1107 (10th Cir. 2018) (applying Maryland law); [Fogelin v. Nordblom](#), 402 Mass. 218, 521 N.E.2d 1007 (1988).  
As to classes of shares in a business trust, see § 16.
- 4 [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 5 [Siedletz v. Griffith](#), 18 Cal. 2d 227, 114 P.2d 598 (1941).
- 6 [Terrydale Liquidating Trust v. Barness](#), 611 F. Supp. 1006 (S.D. N.Y. 1984); [Saminsky v. Abbott](#), 40 Del. Ch. 528, 185 A.2d 765 (1961).
- 7 [Beedle v. Campbell](#), 100 F.2d 798 (C.C.A. 8th Cir. 1939) (applying Missouri law); [Greer Inv. Co. v. Booth](#), 62 F.2d 321 (C.C.A. 10th Cir. 1932); [In re Dean's Trust](#), 47 Haw. 629, 394 P.2d 432 (1964); [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).  
Where the defendant, while a trustee, trust advisor and property manager for a common-law real estate trust accepted payments of unauthorized commissions, his actions were ultra vires and the trust could maintain an action against him to recover the improper payments. [Wisconsin Real Estate Inv. Trust v. Weinstein](#), 712 F.2d 1095 (7th Cir. 1983).
- 8 [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).  
Trustees of a business trust, who had no direct financial interest in the underlying transaction and who were indemnified for potential liability under the trust declaration, were "independent," as required for



- application of the business judgment doctrine. *Halebian v. Berv*, 548 Fed. Appx. 641 (2d Cir. 2013) (applying Massachusetts law).
- 9 *BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank, National Association*, 247 F. Supp. 3d 377 (S.D. N.Y. 2017), objections overruled, 2017 WL 3610511 (S.D. N.Y. 2017) (applying Delaware law).
- 10 *Forbes v. Forbes*, 2015 WY 13, 341 P.3d 1041 (Wyo. 2015) (the trustee of a Massachusetts business trust breached the duty of loyalty to the trust beneficiaries when he entered into water rights transactions involving property belonging to the trust, in which the trustee's private property, which had never had water rights, gained water rights; although the trustee might have acted with the best interest of the trust in mind, he engaged in self-dealing and failed to distinguish between property held by the trust and property held by individual family members, including himself).
- 11 *Winn v. Shugart*, 112 F.2d 617 (C.C.A. 10th Cir. 1940) (applying New Mexico law).
- 12 *Beedle v. Campbell*, 100 F.2d 798 (C.C.A. 8th Cir. 1939).
- 13 *Haskell v. Patterson*, 165 Ark. 65, 262 S.W. 1002 (1924).
- 14 *Fourth Nat. Bank v. Memorial Park*, 1937 OK 464, 181 Okla. 574, 75 P.2d 887 (1937).
- 15 *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, 127 Tex. 158, 89 S.W.2d 394 (1935).
- 16 *Vestal v. Moore*, 167 Ark. 192, 266 S.W. 948 (1924).
- 17 *Terrydale Liquidating Trust v. Barness*, 611 F. Supp. 1006 (S.D. N.Y. 1984).
- 18 *Wofford v. Twin City Brick & Tile Co.*, 184 Ark. 162, 41 S.W.2d 1079 (1931).
- 19 *Donnelly v. Consolidated Inv. Trust*, 99 F.2d 185 (C.C.A. 1st Cir. 1938).

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## 13 Am. Jur. 2d Business Trusts § 47

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### Business Trusts

Karen L. Schultz, J.D.

#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

###### 1. To the Trust and Shareholders

### § 47. Trustee of business trust dealing individually with trust or shareholders

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

While transactions between the trustee of a business trust and the beneficiaries are not prohibited and sometimes are expressly authorized by trust instruments,<sup>1</sup> such transactions are subject to close scrutiny and courts will set them aside on slight grounds.<sup>2</sup> In dealings with the beneficiaries, the trustee is held to the highest degree of candor and frankness; he must not only be strictly truthful in all his representations but must not remain silent concerning any matter of which he has knowledge that would throw light upon the trust estate.<sup>3</sup> A trustee of a business trust in the presentation and consideration of his individual claim against the trust estate cannot vote as a trustee upon the approval of the claim if his vote is necessary to secure favorable action.<sup>4</sup> A trustee may purchase trust property for his or her own benefit where the trustee has no control over the sale.<sup>5</sup>

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#### Footnotes

- 1 [Cohen v. U.S. Trust Securities Corp.](#), 311 Mass. 152, 40 N.E.2d 282 (1942).  
As to trust instrument in business trusts, see § 10.
- 2 [Winn v. Shugart](#), 112 F.2d 617 (C.C.A. 10th Cir. 1940) (applying New Mexico law).  
As to fiduciary duties of trustee to beneficiaries of business trust and prohibition against self-dealing and conflicts of interest, see § 46.
- 3 [Winn v. Shugart](#), 112 F.2d 617 (C.C.A. 10th Cir. 1940).
- 4 [Gordon Campbell Petroleum Co. v. Gordon Campbell-Kevin Syndicate](#), 75 Mont. 261, 242 P. 540 (1926).
- 5 [Victor v. Hillebrecht](#), 405 Ill. 264, 90 N.E.2d 751 (1950).

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## 13 Am. Jur. 2d Business Trusts § 48

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

###### 1. To the Trust and Shareholders

### § 48. Care and skill required of trustee of business trust; liability for negligence or misconduct

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

Generally, in managing trust property, trustees must act with skill, care, diligence, caution, and prudence.<sup>1</sup> Courts require the trustee to act as would an ordinary prudent person.<sup>2</sup> A trustee meeting the applicable standard of care is not an insurer of the trust estate.<sup>3</sup> These principles apply to the measure of care and skill required of the trustee of a business trust.<sup>4</sup> Where the business trustees have acted in good faith and have exercised honest judgment in the lawful and legitimate furtherance of the trust's purposes, a court will neither inquire into nor interfere with their actions.<sup>5</sup> Where a provision in a business trust stated that no trustee should be held personally liable for any act performed in good faith, the trustees did not owe a higher duty to the beneficiaries than the ordinary standard of good faith.<sup>6</sup> When trustees act according to their best judgment and in good faith, they should be protected though they make some trifling mistake in doubtful matters.<sup>7</sup> The trustees of a business trust are liable for losses resulting from their willful breach of trust or diversion of trust funds<sup>8</sup> and for funds of the trust used by them for purposes other than trust purposes.<sup>9</sup>

A provision of a declaration of trust which operates to exonerate the trustees from liability for breach of their duties is unenforceable.<sup>10</sup>

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#### Footnotes

- <sup>1</sup> As to standard or measure of care or diligence of trustee, see [Am. Jur. 2d, Trusts § 362](#).
- <sup>2</sup> As to prudent person rule as standard or measure of care or diligence of trustee, see [Am. Jur. 2d, Trusts § 362](#).

- 3 As to standard or measure of care or diligence of trustee, see [Am. Jur. 2d, Trusts § 362](#).
- 4 [Loring v. U.S.](#), 80 F. Supp. 781 (D. Mass. 1948); [SC Note Acquisitions, LLC v. Wells Fargo Bank, N.A.](#), 934 F. Supp. 2d 516 (E.D. N.Y. 2013), [aff'd](#), 548 Fed. Appx. 741 (2d Cir. 2014) (applying New York law); [Friedman v. Gorin](#), 359 Mass. 745, 269 N.E.2d 246 (1971).
- 5 [Terrydale Liquidating Trust v. Barness](#), 846 F.2d 845 (2d Cir. 1988).
- Compliance by a real estate investment trust with its contractual obligations precluded liability for breaching the fiduciary duty arising from the declaration of trust. [Stender v. Archstone-Smith Operating Trust](#), 910 F.3d 1107 (10th Cir. 2018) (applying Maryland law).
- The evidence established that the former directors and officers of a business trust, sued by a group of shareholders dissenting to a leveraged buyout, recommended the offered price solely because they believed that it was in the best interests of the stockholders and not because of any self-interest or other motive and the evidence established that the transaction was at arm's length and that the recommended price equaled or exceeded the fair market value of the stock. [Beebe v. Pacific Realty Trust](#), 578 F. Supp. 1128 (D. Or. 1984).
- Breach of fiduciary duty claims against trustees of a real estate investment trust (REIT) by owners of the REIT's convertible preferred shares, which claims challenged the merger of the REIT with another entity based in part on a section of the merger agreement providing for the repayment of high-interest debt, were precluded by the business judgment rule; the claims asked the court to evaluate the conduct of trustees in going forward with the merger, which common shareholders voted overwhelmingly to approve following full disclosure. [Kimeldorf v. First Union Real Estate Equity and Mortgage Investments](#), 309 A.D.2d 151, 764 N.Y.S.2d 73 (1st Dep't 2003).
- Investors in real estate mortgage investment conduit (REMIC) securitization trusts failed to plausibly allege that the trustee breached a pooling and servicing agreement (PSA) that governed the trusts by failing to monitor the performance of the mortgage-loan servicer or safeguard the trust assets; the PSA imposed no generalized monitoring or safeguarding duties on the trustee, but rather left to the trustee's discretion whether to investigate information provided by the servicer, and the investors did not allege they provided indemnity to the trustee as required to trigger any monitoring or safeguarding duty of the trustee pursuant to a provision requiring the trustee to hold the trust estate for the benefit of investors and providing the trustee with power to enforce the investors' rights under the PSA. [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011).
- 6 [Forbes v. Forbes](#), 2015 WY 13, 341 P.3d 1041 (Wyo. 2015).
- 7 [Downey Co. v. 282 Beacon St. Trust](#), 292 Mass. 175, 197 N.E. 643 (1935).
- 8 [Digney v. Blanchard](#), 226 Mass. 335, 115 N.E. 424 (1917).
- Investors in real estate mortgage investment conduit (REMIC) securitization trusts adequately alleged that the trustee breached a contractual duty to notify the investors of the mortgage-loan servicer's breaches of a pooling and servicing agreement (PSA) governing the trusts, as required to state a claim against the trustee for breach of the PSA, where the investors alleged that the trustee was aware of the servicer's breaches in abandoning legitimate collections practices as a result of the servicer's settlement of actions brought by the mortgagors and the FTC, and that the trustee did not report the breaches to the investors. [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011).
- 9 [Wichita Royalty Co. v. City Nat. Bank of Wichita Falls](#), 127 Tex. 158, 89 S.W.2d 394 (1935).
- 10 [Chabot v. Empire Trust Co.](#), 301 F.2d 458 (2d Cir. 1962).

## 13 Am. Jur. 2d Business Trusts § 49

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### Business Trusts

Karen L. Schultz, J.D.

#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

###### 1. To the Trust and Shareholders

### § 49. Rights in property or benefits acquired by trustees of business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

Where a trustee of a business trust acquires a debt or claim against the trust estate or acquires an outstanding title to trust property, the purchase inures to the benefit of the trust estate.<sup>1</sup> Similarly, any profit made by trustees out of the trust ordinarily inures to the benefit of the beneficiaries.<sup>2</sup> Thus, trustees who accept a new lease in substitution for one owned by the trust estate are liable to an accounting to the shareholders for the proceeds realized and wrongfully retained.<sup>3</sup> Where trustees of a business trust acquire in their own individual names or on their personal account property necessary or appropriate for the business or purposes of the trust, the property will be treated as being held in trust for the benefit of the shareholders upon their payment of the purchase price.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Beedle v. Campbell](#), 100 F.2d 798 (C.C.A. 8th Cir. 1939) (applying Missouri law).
- <sup>2</sup> [Beedle v. Campbell](#), 100 F.2d 798 (C.C.A. 8th Cir. 1939) (applying Missouri law).
- <sup>3</sup> [Skinner v. Cromwell](#), 40 F.2d 241 (C.C.A. 10th Cir. 1930) (applying Oklahoma law).
- <sup>4</sup> [Wofford v. Twin City Brick & Tile Co.](#), 184 Ark. 162, 41 S.W.2d 1079 (1931).

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## 13 Am. Jur. 2d Business Trusts § 50

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### Business Trusts

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#### V. Trustees, Officers, and Agents

#### C. Duties and Liabilities

#### 2. To Third Persons

### § 50. Liability of trustees of business trust to third persons

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596, 3599 to 3603

#### Forms

Forms relating to liability and non-liability, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

The liability of trustees of business trusts to third persons may be affected by statute.<sup>1</sup> Also, it is possible for a creditor, by his own action, to forfeit the right to enforce the personal liability of a trustee of a business trust<sup>2</sup> and a creditor may be estopped to assert the individual liability of trustees.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Liquid Carbonic Co. v. Sullivan](#), 1924 OK 819, 103 Okla. 78, 229 P. 561 (1924).  
The scope of a statute providing insulation from personal liability for a trustee does not encompass the case of trustees who are trustees for themselves in the conduct of business affairs or are trustees of a nominee trust. [Apahouser Lock and Sec. Corp. v. Carvelli](#), 26 Mass. App. Ct. 385, 528 N.E.2d 133 (1988).
- <sup>2</sup> [Wm. Lindeke Land Co. v. Kalman](#), 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).

3 [Continental Supply Co. v. Robertson, 166 Ark. 52, 265 S.W. 659 \(1924\).](#)

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## 13 Am. Jur. 2d Business Trusts § 51

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### Business Trusts

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### V. Trustees, Officers, and Agents

### C. Duties and Liabilities

### 2. To Third Persons

## § 51. Liability of trustees of business trust to third persons for debts and contracts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596, 3599 to 3603

In the absence of a stipulation or agreement to the contrary, the trustees of a business trust are personally liable for debts incurred and on contracts made by them on behalf of the trust.<sup>1</sup> The fact that a person contracts as a trustee of a business trust does not relieve him from personal liability nor restrict his liability to the amount of the trust estate.<sup>2</sup> Trustees are clearly liable on a contract made by them in their individual capacity<sup>3</sup> or on an unauthorized contract purportedly made on behalf of the trust.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Slatt v. Thomas](#), 95 Colo. 382, 36 P.2d 459 (1934); [McClaren v. Dawes Electric Sign & Mfg. Co.](#), 86 Ind. App. 196, 156 N.E. 584 (1927); [Linn v. Houston](#), 123 Kan. 409, 255 P. 1105 (1927); [Apahouser Lock and Sec. Corp. v. Carvelli](#), 26 Mass. App. Ct. 385, 528 N.E.2d 133 (1988).

As to power to make contracts and incur debt, generally, see § 42.
- <sup>2</sup> [James Stewart & Co. v. National Shawmut Bank of Boston](#), 75 F.2d 148 (C.C.A. 1st Cir. 1935) (applying Massachusetts law).
- <sup>3</sup> [Andrews v. Horton](#), 8 Cal. App. 2d 40, 47 P.2d 496 (2d Dist. 1935).
- <sup>4</sup> [Weissbrodt v. Elmore & Co.](#), 262 Ill. App. 1, 1931 WL 3035 (1st Dist. 1931), cert. denied.

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## 13 Am. Jur. 2d Business Trusts § 52

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### Business Trusts

Karen L. Schultz, J.D.

### V. Trustees, Officers, and Agents

### C. Duties and Liabilities

### 2. To Third Persons

## § 52. Liability of trustees of business trust to third persons for torts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596, 3599 to 3603

The trustees of a business trust are personally liable for torts committed in the administration of the trust.<sup>1</sup>

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### Footnotes

- 1 [New Hampshire Ins. Co., Inc. v. McCann](#), 429 Mass. 202, 707 N.E.2d 332 (1999); [Fisheries Co. v. McCoy](#), 202 S.W. 343 (Tex. Civ. App. San Antonio 1918), writ granted, (Feb. 5, 1919) and writ dismissed, (Apr. 5, 1922); [Marchulonis v. Adams](#), 97 W. Va. 517, 125 S.E. 340 (1924).

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## 13 Am. Jur. 2d Business Trusts § 53

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### Business Trusts

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### V. Trustees, Officers, and Agents

### C. Duties and Liabilities

### 2. To Third Persons

## § 53. Agreement with creditors as to immunity or liability of trustees of business trust; indication of representative capacity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3594](#) to [3596](#), [3599](#) to [3603](#)

The trustees of a business trust may, by contractual stipulation, exempt themselves from personal liability on contracts made by them on behalf of the trust.<sup>1</sup> Such an agreement against personal liability on a contract is valid and is not illegal or contrary to public policy<sup>2</sup> and creditors who stipulate against the personal liability of trustees or agree to look solely to the trust estate cannot recover against the trustees in their individual capacity.<sup>3</sup> The protection of such an express stipulation will not be denied to the trustees because they failed to execute properly a contract within their authority.<sup>4</sup> An agreement against personal liability on the part of the trustees may be inferred where the trust instrument contains a provision exempting the trustees from liability<sup>5</sup> and the intention of the contracting parties to exempt the trustees from personal liability may be established by the surrounding circumstances or by extrinsic evidence, in connection with the contract itself.<sup>6</sup> Notwithstanding a provision of the trust instrument exempting trustees from personal liability for the debts of the trust, they may assume liability for such debts by agreement with the creditor.<sup>7</sup> Language of the contract indicating that the trustees intend to be bound as trustees, and not individually, is sometimes sufficient to relieve the trustees of personal liability.<sup>8</sup>

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### Footnotes

- 1 [Town of Hull v. Tong](#), 14 Mass. App. Ct. 710, 442 N.E.2d 427 (1982); [Shelton v. Montoya Oil & Gas Co.](#), 292 S.W. 165 (Tex. Comm'n App. 1927).

- 2 Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); Pennsylvania Co. for  
Insurances on Lives and Granting Annuities v. Wallace, 346 Pa. 532, 31 A.2d 71, 156 A.L.R. 1 (1943).
- 3 Taylor v. Mayo, 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884); Goldwater v. Oltman, 210 Cal. 408, 292  
P. 624, 71 A.L.R. 871 (1930); Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Wallace,  
346 Pa. 532, 31 A.2d 71, 156 A.L.R. 1 (1943).
- 4 Rand v. Farquhar, 226 Mass. 91, 115 N.E. 286 (1917).  
As to business trustee's power to make contracts and incur debts, see § 42.
- 5 Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Wallace, 346 Pa. 532, 31 A.2d 71, 156  
A.L.R. 1 (1943).
- 6 Hamilton v. Young, 116 Kan. 128, 225 P. 1045, 35 A.L.R. 496 (1924); Wm. Lindeke Land Co. v. Kalman,  
190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934); In re Winter's Estate, 133 N.J. Eq. 245, 31 A.2d 769  
(Prerog. Ct. 1943), decree aff'd by, 136 N.J. Eq. 112, 40 A.2d 648 (Ct. Err. & App. 1945).
- 7 American Mining & Smelting Co. v. Converse, 175 Mass. 449, 56 N.E. 594 (1900).
- 8 Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).

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## 13 Am. Jur. 2d Business Trusts § 54

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### Business Trusts

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### V. Trustees, Officers, and Agents

### C. Duties and Liabilities

### 2. To Third Persons

## § 54. Business trust instrument provisions as to liability of trustees; effect and sufficiency of notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3594 to 3596](#), [3599 to 3603](#)

A provision of a trust instrument exempting the trustees from personal liability is valid and not contrary to public policy.<sup>1</sup> However, such a provision is not effective as against a person contracting with or extending credit to the trustees without notice of the provision; in the absence of an agreement by the creditor relieving the trustees of personal liability, they are liable to a creditor without notice, notwithstanding such a provision of the trust instrument.<sup>2</sup> A provision of the trust instrument making it the duty of the trustees to insert in every written contract a stipulation that neither the trustees nor the members will be personally liable on the contract and that persons contracting with the trustees will look only to the property of the trust for payment does not relieve the trustees from personal liability on contracts made by them for the benefit of the trust where the contracts contain no stipulation against such personal liability and the contracting party had no notice of the provision.<sup>3</sup>

The personal liability of the trustees of a business trust may be limited by provisions to that effect in the declaration of trust if known and agreed to by all the parties affected.<sup>4</sup> Persons who deal with such trustees with notice of a provision of the trust instrument purporting to exempt the trustees from personal liability on account of the debts and contracts of the trust cannot recover against the trustees individually on such debts or contracts.<sup>5</sup> One dealing with a trustee who by provision in the declaration of trust is protected from personal liability stemming from contracts entered into by the trust receives adequate notice of such provision when the trustee presents a certificate signed by the trustee which informs the other party that the declaration of trust is recorded.<sup>6</sup> However, persons contracting with the trustees are not necessarily chargeable with notice of provisions of the trust instrument purporting to limit the liability of the trustees even though the trust instrument is recorded.<sup>7</sup>

Footnotes

- 1 [Halebian v. Berv](#), 548 Fed. Appx. 641 (2d Cir. 2013) (applying Massachusetts law); [Carpenter v. Elmer R. Sly Co.](#), 109 Cal. App. 539, 293 P. 162 (3d Dist. 1930); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).  
As to trust instrument in business trusts, see § 10.
- 2 [Dickinson v. Butt](#), 169 Ark. 1211, 278 S.W. 19 (1925); [Review Printing & Stationery Co. v. McCoy](#), 276 Ill. App. 580, 1934 WL 2949 (2d Dist. 1934); [Linn v. Houston](#), 123 Kan. 409, 255 P. 1105 (1927); [Walker v. Hatfield](#), 17 S.W.2d 357 (Mo. Ct. App. 1929).
- 3 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Review Printing & Stationery Co. v. McCoy](#), 291 Ill. App. 524, 10 N.E.2d 506 (2d Dist. 1937); [McClaren v. Dawes Electric Sign & Mfg. Co.](#), 86 Ind. App. 196, 156 N.E. 584 (1927).
- 4 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930).
- 5 [James Stewart & Co. v. National Shawmut Bank of Boston](#), 75 F.2d 148 (C.C.A. 1st Cir. 1935) (applying Massachusetts law); [Commercial Cas. Ins. Co. v. North](#), 320 Ill. App. 221, 50 N.E.2d 434 (2d Dist. 1943); [State v. Thomas](#), 209 N.C. 722, 184 S.E. 529 (1936).
- 6 [Roy v. First Eastern Bank](#), 781 F. Supp. 821 (D. Mass. 1992).
- 7 [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Hunter v. Winter](#), 268 Ill. App. 487, 1932 WL 2664 (1st Dist. 1932).  
As to recording trust instrument for business trust, see § 10.

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## 13 Am. Jur. 2d Business Trusts § 55

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### Business Trusts

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#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

#### 3. Rights and Liabilities of Trustees Inter Se; Liability for Acts of Other Trustees

### § 55. Individual rights and liabilities of trustees of business trust inter se

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

As among themselves, the trustees of a business trust do not occupy the relationship of partners.<sup>1</sup> While a provision of the trust instrument exempting the trustees from personal liability may constitute a contract as between the trustees, precluding one of them from recovering against another on account of a trust indebtedness, such a provision does not prevent a trustee who has been relieved of his liability as such from recovering against the other trustees on an indebtedness not contracted directly between the trust and the trustee but assigned to the trustee after his release from liability as such.<sup>2</sup> A trustee may, in a proper case, maintain a suit to compel his cotrustees to recognize his position as trustee.<sup>3</sup>

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#### Footnotes

- 1 [Stewart v. Solomon](#), 316 Pa. 236, 175 A. 498 (1934).
- 2 [Dickinson v. Butt](#), 169 Ark. 1211, 278 S.W. 19 (1925).  
As to trust instrument in business trusts, see [§ 10](#).
- 3 [Lambach v. Anderson](#), 228 Iowa 1173, 293 N.W. 505 (1940).

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## 13 Am. Jur. 2d Business Trusts § 56

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#### V. Trustees, Officers, and Agents

##### C. Duties and Liabilities

#### 3. Rights and Liabilities of Trustees Inter Se; Liability for Acts of Other Trustees

### § 56. Liability of trustees of business trust for acts or defaults of cotrustees, predecessors, or successors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3594 to 3596

The trustee of a business trust is not responsible for the acts or misconduct of a cotrustee in which he has not joined, to which he has not consented, and which he has not aided or made possible by his own neglect.<sup>1</sup> One trustee cannot be held liable on a debt incurred in the name of the trust by a cotrustee, merely because the latter incurred the obligation in such a way as to render himself personally liable.<sup>2</sup> In the absence of something other than the mere relationship of cotrustees, one trustee of a business trust cannot bind his cotrustees by representations that the latter will be responsible for obligations incurred by the former.<sup>3</sup> This principle does not, however, excuse a trustee from liability where the wrongs committed by his cotrustee were made possible by the former's neglect and his failure to inform himself concerning the various business transactions involved in the execution of the trust and by his surrender of the control of the trust affairs to his cotrustee or to a dominant shareholder.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Ashley v. Winkley](#), 209 Mass. 509, 95 N.E. 932 (1911).
- <sup>2</sup> [Uihlein v. Budd](#), 252 Ill. App. 487, 1929 WL 3222 (1st Dist. 1929); [Plum v. Siekmann](#), 135 Neb. 101, 280 N.W. 264 (1938).
- <sup>3</sup> [Plum v. Siekmann](#), 135 Neb. 101, 280 N.W. 264 (1938).
- <sup>4</sup> [Ashley v. Winkley](#), 209 Mass. 509, 95 N.E. 932 (1911).



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## 13 Am. Jur. 2d Business Trusts VI Refs.

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### Business Trusts

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### VI. Liability of Trust Estate and Availability of Trust Property to Creditors

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3599 to 3603

### A.L.R. Library

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West's A.L.R. Digest, [Corporations and Business Organizations](#)  3599 to 3603

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## 13 Am. Jur. 2d Business Trusts § 57

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### Business Trusts

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#### VI. Liability of Trust Estate and Availability of Trust Property to Creditors

### § 57. Liability of trust estate and availability of trust property to creditors; effect of stipulations regarding liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3599 to 3603

In the absence of a statute or of a provision to the contrary in the contract or in the trust instrument, the property of a business trust cannot be subjected to the claims of persons dealing with the trustees by the ordinary writs and processes in an action at law.<sup>1</sup> Under these circumstances the trust estate is not liable by implication because of benefits received by it under a contract between a trustee and a third person.<sup>2</sup> Where the trustees are personally liable for a debt, the trust property cannot be reached by execution or attachment so as to prefer the creditors over other creditors in settlement of the trust.<sup>3</sup> A statute according creditors of business trusts, as contrasted with creditors of traditional trusts, rights similar to those available to creditors of other business associations, permitting a direct action to be brought against a business trust and subjecting its property to attachment and execution in like manner as if it were a corporation, does not relieve a trustee of personal liability.<sup>4</sup> The trustees acting within their authority may, by contract express or implied, create a lien on trust property to secure the performance of a contract entered into in behalf of the trust and such lien will be enforced.<sup>5</sup>

The trust estate cannot ordinarily be directly reached by a creditor of an individual shareholder; the interest of a shareholder being personality and not real estate, the levy of an execution on real estate, title to which is held by the trustees, on a judgment against a shareholder individually, creates no lien on the trust property.<sup>6</sup>

The right of persons dealing with a business trust to resort to the property of the trust estate for satisfaction of their claims may depend upon stipulations for liability of the trust estate or against the personal liability of trustees or beneficiaries expressed in the trust instrument or in the contract between the trustees and such third person; where the trust instrument exempts the trustees from personal liability and provides that persons having claims against the trust will look to the trust estate for payment, such persons are entitled to proceed in equity to recover therefor out of the trust estate.<sup>7</sup> However, a trust instrument provision requiring the trustees in every written contract to stipulate against the personal liability of trustees and beneficiaries and to give

notice of their capacity as trustees does not render the trust estate liable on an implied contract for benefits received by it from a contract between a trustee and a third person.<sup>8</sup>

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Footnotes

- 1 [Bartley v. Andrews](#), 208 A.D. 702, 202 N.Y.S. 227 (2d Dep't 1923).
- 2 [Austin v. Parker](#), 317 Ill. 348, 148 N.E. 19 (1925).
- 3 [Hussey v. Arnold](#), 185 Mass. 202, 70 N.E. 87 (1904).  
As to liabilities of trustees to third parties, see §§ 50 to 54.
- 4 [Town of Hull v. Tong](#), 14 Mass. App. Ct. 710, 442 N.E.2d 427 (1982).
- 5 [Industrial Lumber Co. v. Texas Pine Land Ass'n](#), 31 Tex. Civ. App. 375, 72 S.W. 875 (1903), writ refused.
- 6 [In re Pittsburg Wagon Works' Estate](#), 204 Pa. 432, 54 A. 316 (1903).
- 7 [Rothbart v. Metropolitan Trust Co.](#), 307 Ill. App. 271, 30 N.E.2d 183 (1st Dist. 1940).  
As to business trust instrument provisions as to liability of trustees and effect and sufficiency of notice, see § 54.
- 8 [Austin v. Parker](#), 317 Ill. 348, 148 N.E. 19 (1925).

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## 13 Am. Jur. 2d Business Trusts § 58

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### Business Trusts

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#### VI. Liability of Trust Estate and Availability of Trust Property to Creditors

## § 58. Right to indemnity or reimbursement from business trust

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3599 to 3603

The principal that a trustee, when acting within its powers, is entitled to exoneration or reimbursement<sup>1</sup> applies with full force to Massachusetts or business trusts.<sup>2</sup> The trust estate can be reached under this doctrine only where the estate is indebted to the trustee or would be required to pay the trustee if he paid the claim and the trustee is insolvent or a nonresident.<sup>3</sup>

### Observation:

There was no evidence that an underwriter was a director or officer of a real estate trust, as required for the underwriter's claims under the trust's bylaws, state law, and an amended and restated management agreement, seeking indemnification against the trust for the underwriter's defense of the trust's counterclaims.<sup>4</sup>

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### Footnotes

- <sup>1</sup> As to right to exoneration or indemnity, see [Am. Jur. 2d, Trusts § 413](#).
- <sup>2</sup> [Austin v. Parker](#), 317 Ill. 348, 148 N.E. 19 (1925); [Mayo v. Moritz](#), 151 Mass. 481, 24 N.E. 1083 (1890).
- <sup>3</sup> [Austin v. Parker](#), 317 Ill. 348, 148 N.E. 19 (1925).

4 As to right of trustee of business trust to reimbursement or indemnity, see § 36.  
[Bizjak v. Gramercy Capital Corp.](#), 95 A.D.3d 469, 944 N.Y.S.2d 57 (1st Dep't 2012).

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## 13 Am. Jur. 2d Business Trusts VII A Refs.

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VII. Regulation

A. State Regulation

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

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## 13 Am. Jur. 2d Business Trusts § 59

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### Business Trusts

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### VII. Regulation

#### A. State Regulation

## § 59. State regulation of business trusts, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580, 3581

### A.L.R. Library

[Modern status of the Massachusetts or business trust](#), 88 A.L.R.3d 704

The power of the states to regulate business trusts in various respects is settled.<sup>1</sup>

### Observation:

The trust laws are regulatory in nature, enacted for the protection of the public, and are in no way designed to give exclusive benefits to institutions which have been granted a license to conduct the business of operating a trust company.<sup>2</sup>



No unreasonable discrimination arises from a statute which regulates the activities of business trusts as distinguished from traditional kinds of trusts,<sup>3</sup> and the right of a business trust to do business within a state as a legal entity may be conditioned upon its compliance with the laws governing such organizations.<sup>4</sup> The sale of its own shares by a business trust does not constitute doing business within the meaning of regulatory statutes<sup>5</sup> nor does the fact that security for a loan is located in a particular state where all negotiations and documentation regarding the loan are conducted in another state.<sup>6</sup>

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Footnotes

- 1 [Hemphill v. Orloff](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); [Williams v. Equity Holding Corp.](#), 498 F. Supp. 2d 831 (E.D. Va. 2007); [Swartz v. Sher](#), 344 Mass. 636, 184 N.E.2d 51 (1962).  
Statutes or regulations pertaining to business trusts may require the filing of the trust instrument with various state and local authorities. [Pacific Am. Realty Trust v. Lonctot](#), 62 Wash. 2d 91, 381 P.2d 123 (1963).
- 2 [In re Dorsey & Whitney Trust Co. LLC](#), 2001 SD 35, 623 N.W.2d 468 (S.D. 2001).
- 3 [Ex parte Girard](#), 186 Cal. 718, 200 P. 593 (1921).
- 4 [Coleman v. McKee](#), 162 Ark. 90, 257 S.W. 733 (1924); [Thompson v. Schmitt](#), 115 Tex. 53, 274 S.W. 554 (1925); [Pacific Am. Realty Trust v. Lonctot](#), 62 Wash. 2d 91, 381 P.2d 123 (1963).
- 5 [Home Lumber Co. v. Hopkins](#), 107 Kan. 153, 190 P. 601, 10 A.L.R. 879 (1920).
- 6 [Your Const. Center, Inc. v. Dominion Mortg. and Realty Trust \(Dominion\)](#), 402 F. Supp. 757 (S.D. Fla. 1975).

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## 13 Am. Jur. 2d Business Trusts § 60

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### Business Trusts

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### VII. Regulation

#### A. State Regulation

## § 60. Regulation of business trusts under state statutes relating to corporations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3550](#), [3551](#), [3580](#), [3581](#)

A state has the power to include business trusts within the definition of "corporations,"<sup>1</sup> and may, accordingly, require business trusts to file reports and pay fees.<sup>2</sup> They have been regulated as corporations under general constitutional and statutory provisions that the term "corporation" should include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships.<sup>3</sup> A business trust does not come within the prohibition of a statute imposing penalties on corporations for holding real estate in a manner forbidden by the state constitution.<sup>4</sup>

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### Footnotes

- 1 [Hemphill v. Orloff](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928).  
As to nature of corporations, generally, see [Am. Jur. 2d, Corporations](#) §§ 1 to 5.
- 2 [Neddeau v. United Petroleum](#), 251 Mich. 673, 232 N.W. 202 (1930).
- 3 [Rubens v. Costello](#), 75 Ariz. 5, 251 P.2d 306 (1952); [Home Lumber Co. v. Hopkins](#), 107 Kan. 153, 190 P. 601, 10 A.L.R. 879 (1920).
- 4 [State ex rel. Combs v. Hopping Inv. Co.](#), 1954 OK 125, 269 P.2d 997 (Okla. 1954).

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## 13 Am. Jur. 2d Business Trusts § 61

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### Business Trusts

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### VII. Regulation

#### A. State Regulation

## § 61. Regulation of business trusts under state statutes relating to foreign corporations

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  [3550](#), [3551](#), [3580](#), [3581](#), [3607](#)

A business trust seeking to carry on business in a state other than that in which it was organized, as an entity clothed with peculiar rights and privileges not possessed by individuals or partnerships, may be subjected to the conditions, such as the procurement of a certificate of authority which are usually imposed upon foreign corporations.<sup>1</sup>

### Observation:

Treating a foreign business trust as a foreign corporation for the purpose of such regulations does not violate any constitutional rights of the trust or of the members thereof.<sup>2</sup> Specifically, such legislation does not violate the Privileges and Immunities Clause of the U.S. Constitution.<sup>3</sup>

The fact that by the constitution and statutes of the state where a trust was organized it would not be deemed a corporation is without significance in determining the applicability to the trust of local statutes and constitutional provisions relating to foreign corporations.<sup>4</sup> A business trust organized in another state may be deemed a foreign corporation and subject to the regulations imposed by statute upon foreign corporations doing business in the state.<sup>5</sup>

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Footnotes

- 1 [Hemphill v. Orloff](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); [Gilmer v. Kansas City West Land Co., Inc.](#), 1 Kan. App. 2d 509, 571 P.2d 36 (1977).  
Regulation of foreign corporation doing business within state, generally, see [Am. Jur. 2d, Foreign Corporations](#) §§ 157 to 268.
- 2 [Hemphill v. Orloff](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928).
- 3 [Hemphill v. Orloff](#), 238 Mich. 508, 213 N.W. 867, 58 A.L.R. 507 (1927), [aff'd](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); [State ex rel. Colvin v. Paine](#), 137 Wash. 572, 247 P. 476, 46 A.L.R. 165 (1926).
- 4 [Harris v. U.S. Mexico Oil Co.](#), 110 Kan. 532, 204 P. 754 (1922).
- 5 [State ex rel. Ferguson v. United Royalty Co.](#), 188 Kan. 443, 363 P.2d 397 (1961); [Hemphill v. Orloff](#), 238 Mich. 508, 213 N.W. 867, 58 A.L.R. 507 (1927), [aff'd](#), 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928).  
Foreign associations, including business trusts, are typically required to register with the state. [Milby v. Pote](#), 2018 PA Super 155, 189 A.3d 1065 (2018), [appeal denied](#), 199 A.3d 340 (Pa. 2018).

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580 to 3585

### A.L.R. Library

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## 13 Am. Jur. 2d Business Trusts § 62

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#### B. Blue Sky Laws and Securities Acts

## § 62. Regulation of business trusts under blue sky laws and securities laws

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580 to 3585

Statutes regulating the issuance and sale of securities, commonly known as "blue sky laws," generally are construed as applying to Massachusetts or business trusts and as requiring such organizations to comply with them as a condition of the right to sell their shares.<sup>1</sup> Some such securities acts, or blue sky laws, specifically are made applicable to business trusts.<sup>2</sup> Also, the shares of a business trust have been held subject to regulation under blue sky laws applicable in terms to an investment company,<sup>3</sup> or an "issuer" of securities,<sup>4</sup> or generally to any person, firm, association, company, or corporation selling securities or offering them for sale.<sup>5</sup>

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### Footnotes

- 1 [Reilly v. Clyne](#), 27 Ariz. 432, 234 P. 35, 40 A.L.R. 1005 (1925); [State v. Cosgrove](#), 36 Idaho 278, 210 P. 393 (1922); [Pennicard v. Coe](#), 124 Or. 423, 263 P. 920 (1928).  
As to registration of securities, generally, see [Am. Jur. 2d, Securities Regulation—State §§ 67 to 105](#).
- 2 [Agnew v. Daugherty](#), 189 Cal. 446, 209 P. 34 (1922).
- 3 [King v. Com.](#), 197 Ky. 128, 246 S.W. 162, 27 A.L.R. 1159 (1922); [People v. Clum](#), 213 Mich. 651, 182 N.W. 136, 15 A.L.R. 253 (1921).
- 4 [Kinross v. Cooper](#), 224 Ill. App. 111, 1922 WL 22066 (2d Dist. 1922).
- 5 [Wagner v. Kelso](#), 195 Iowa 959, 193 N.W. 1 (1923).

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#### B. Blue Sky Laws and Securities Acts

## § 63. Regulation of business trusts under blue sky laws and securities laws—Consequences of, and who may assert, violation of statute

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580 to 3585

A trustee's sale of shares in a business trust without a permit from the corporation commissioner as required by the state securities act under circumstances amounting to fraud is absolutely void.<sup>1</sup> However, as regards the rights of a bona fide purchaser for value of real property from the trustees, the failure of the trust to obtain a permit required by the blue sky law does not invalidate a conveyance to the trustees or the conveyance by them.<sup>2</sup> While creditors of a business trust may attack the validity of securities issued by it in violation of a blue sky law, mere strangers may not.<sup>3</sup> A trust cannot recover on a negotiable instrument given for the purchase price of shares sold in violation of the blue sky law,<sup>4</sup> and a person purchasing shares from a trust which sold them in violation of the blue sky law may recover back the purchase price paid.<sup>5</sup> In such a case, the subscriber is not in pari delicto<sup>6</sup> and the defense that the purchaser of the shares was in pari delicto is not available against an action or counterclaim for the purchase price of shares illegally sold since the blue sky laws are intended for the special protection of such persons.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [Barrett v. Gore](#), 88 Cal. App. 372, 263 P. 564 (3d Dist. 1928).
- <sup>2</sup> [Beltz v. Griggs](#), 137 Kan. 429, 20 P.2d 510 (1933).
- <sup>3</sup> [Julian v. Schwartz](#), 16 Cal. App. 2d 310, 60 P.2d 887 (1st Dist. 1936).
- <sup>4</sup> [Reilly v. Clyne](#), 27 Ariz. 432, 234 P. 35, 40 A.L.R. 1005 (1925).
- <sup>5</sup> [Reilly v. Clyne](#), 27 Ariz. 432, 234 P. 35, 40 A.L.R. 1005 (1925); [Barrett v. Gore](#), 88 Cal. App. 372, 263 P. 564 (3d Dist. 1928); [Landwehr v. Lingenfelder](#), 249 S.W. 723 (Mo. Ct. App. 1923).

- 6                      [Landwehr v. Lingenfelder](#), 249 S.W. 723 (Mo. Ct. App. 1923); [Schmidt v. Stortz](#), 208 Mo. App. 439, 236 S.W. 694 (1922).
- 7                      [Reilly v. Clyne](#), 27 Ariz. 432, 234 P. 35, 40 A.L.R. 1005 (1925).

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## 13 Am. Jur. 2d Business Trusts § 64

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#### B. Blue Sky Laws and Securities Acts

## § 64. Regulation of business trusts under federal securities acts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3580 to 3582

The Federal Securities Act of 1933 specifically includes within its provisions trusts in which the beneficial interests are evidenced by "securities";<sup>1</sup> the Trust Indenture Act of 1939 refers to securities issued pursuant to a trust;<sup>2</sup> the Securities Exchange Act of 1934,<sup>3</sup> and the Investment Companies and Advisers Act refer to a certificate of interest in any profit-sharing agreement as a security,<sup>4</sup> and shares in a business trust are securities within the meaning of these federal acts.<sup>5</sup> The Investment Advisers Act confers jurisdiction over actions by private persons for damages or for an accounting and such jurisdiction extends to an action by shareholders of a Massachusetts or business trust against the trust.<sup>6</sup>

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### Footnotes

- <sup>1</sup> 15 U.S.C.A. §§ 77b(a)(1), 77b(a)(2).
- <sup>2</sup> 15 U.S.C.A. § 77ccc(16).
- <sup>3</sup> 15 U.S.C.A. § 78c(a)(10).
- <sup>4</sup> 15 U.S.C.A. § 80a-2(a)(36).
- <sup>5</sup> *Continental Bank & Trust Co. of N. Y. v. First Nat. Petroleum Trust*, 67 F. Supp. 859 (D.R.I. 1946) (Trust Indenture Act of 1939); *Saminsky v. Abbott*, 41 Del. Ch. 320, 194 A.2d 549 (1963), judgment aff'd, 41 Del. Ch. 572, 200 A.2d 572 (1964) (Investment Companies and Advisers Act).  
As to instruments within scope of federal securities law, generally, see [Am. Jur. 2d, Securities Regulation](#) —Federal §§ 13 to 54.
- <sup>6</sup> *Jones v. Equitable Life Assur. Soc. of U. S.*, 409 F. Supp. 370 (S.D. N.Y. 1975).

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## 13 Am. Jur. 2d Business Trusts § 65

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### VIII. Taxation

#### A. State Taxes

## § 65. State taxation of business trust as partnership or corporation

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### West's Key Number Digest

West's Key Number Digest, [Taxation](#)  2230

Where because of the power and control vested in the shareholders, a business trust is in legal contemplation a partnership, its property is taxable according to statutes relating to the taxation of the property of partnerships.<sup>1</sup> However, where the title to trust property and the exclusive management of its business are vested in trustees, free from any control by the shareholders, and the rights of the shareholders are limited to each receiving his share of the profits during the continuation of the trust and of the corpus upon the termination of the trust, the organization is a true trust and will not be taxed as a partnership under such a tax statute.<sup>2</sup> The definition of the term "corporation" in a taxing statute may be so framed as to include business trusts and thus, a business trust is subject to state income tax as a corporation rather than as an individual, where the statute defines "corporations" as including associations and the constitution defines corporations as including all associations having any power or privileges not possessed by individuals.<sup>3</sup> Many jurisdictions have recognized that a Massachusetts or business trust is subject to taxation as a corporation.<sup>4</sup>

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### Footnotes

- 1 [Williams v. City of Boston](#), 208 Mass. 497, 94 N.E. 808 (1911).  
As to control test, generally, see § 7.
- 2 [Williams v. Inhabitants of Milton](#), 215 Mass. 1, 102 N.E. 355 (1913).
- 3 [First Carolina Investors v. Lynch](#), 78 N.C. App. 583, 337 S.E.2d 691 (1985); [Oklahoma-Texas Trust v. Oklahoma Tax Com'n](#), 1946 OK 40, 197 Okla. 114, 168 P.2d 607 (1946).
- 4 [Chapman v. Department of Revenue](#), 110 Ill. App. 3d 82, 65 Ill. Dec. 642, 441 N.E.2d 1156 (1st Dist. 1982); [Commissioner of Revenue v. Smith](#), 392 Mass. 1005, 465 N.E.2d 792 (1984); [Oklahoma-Texas Trust v.](#)

Oklahoma Tax Com'n, 1946 OK 40, 197 Okla. 114, 168 P.2d 607 (1946); *Pacific Am. Realty Trust v. Lonctot*, 62 Wash. 2d 91, 381 P.2d 123 (1963).

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### VIII. Taxation

#### A. State Taxes

## § 66. State franchise or excise tax on business trusts

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### West's Key Number Digest

West's Key Number Digest, [Taxation](#)  2230

A statute imposing a franchise tax on corporations and defining the term "corporations" as including any business conducted by trustees wherein interest or ownership is evidenced by certificates or other written instruments is not unconstitutional.<sup>1</sup> So too, a state legislature has been deemed to have the power to impose a tax upon business trusts for the privilege of doing business within the state and to provide that such tax will be measured by the net income of the trust.<sup>2</sup> A business trust may be properly classified as a corporation subject to a state franchise tax where it is organized for pecuniary gain, has capital stock represented by shares, and has privileges not possessed by individuals or partnerships.<sup>3</sup> On the other hand, since a business trust has its origin in the common-law right of the parties to enter into a contract and does not spring from a franchise granted by the state, constitutional authority to levy excises upon "commodities," a term including corporate franchises, does not empower the legislature to impose an excise tax upon business trusts measured by the value of the shares.<sup>4</sup>

The trustees of a business trust are liable for sales taxes duly levied against the trust.<sup>5</sup>

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### Footnotes

- 1 [Attorney General ex rel. Dept. of Treasury v. Great Lakes Real Estate Inv. Trust](#), 77 Mich. App. 1, 257 N.W.2d 248 (1977); [Thomas, Ltd. v. Department of Treasury](#), 121 N.J. Super. 577, 298 A.2d 285 (App. Div. 1972); [City Bank Farmers Trust Co. v. Graves](#), 272 N.Y. 1, 3 N.E.2d 612, 108 A.L.R. 333 (1936); [First Carolina Investors v. Lynch](#), 78 N.C. App. 583, 337 S.E.2d 691 (1985).
- 2 [Koenig v. Johnson](#), 71 Cal. App. 2d 739, 163 P.2d 746 (3d Dist. 1945).
- 3 [First Carolina Investors v. Lynch](#), 78 N.C. App. 583, 337 S.E.2d 691 (1985).
- 4 [In re Opinion of the Justices](#), 266 Mass. 590, 165 N.E. 904, 63 A.L.R. 952 (1929).

5 [People v. Sischo, 31 Cal. App. 2d 345, 87 P.2d 862 \(3d Dist. 1939\).](#)

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## 13 Am. Jur. 2d Business Trusts § 67

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### VIII. Taxation

#### A. State Taxes

## § 67. State taxation of shares or dividends from business trust

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### West's Key Number Digest

West's Key Number Digest, [Taxation](#)  2230

The shares in a business trust may be taxed as if they were shares of stock in a private corporation,<sup>1</sup> though there is authority to the contrary.<sup>2</sup> A state cannot, under the Due Process Clause of the 14th Amendment, tax as investments or intangible property of a resident of the state transferable certificates of beneficial interest under a declaration of trust entitling the holder to a proportionate share of the rents derived from specified parcels of real estate in other states and to a share in the proceeds of any sale of the property although the trustee holds the property free from control by certificate holders and the latter have no voice in the management of the property.<sup>3</sup>

Dividends from a business trust are taxable under a state income tax statute providing that the term "dividends" should mean all dividends derived from stocks whether paid to its shareholders in cash or in property of the corporation and defining corporations as including "corporations, joint-stock companies, associations or common-law trusts organized or conducted for profit."<sup>4</sup>

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### Footnotes

- 1 [Pacific Am. Realty Trust v. Lonctot](#), 62 Wash. 2d 91, 381 P.2d 123 (1963).
- 2 [Hoadley v. Essex County Com'rs](#), 105 Mass. 519, 1870 WL 7029 (1870).
- 3 [Senior v. Braden](#), 295 U.S. 422, 55 S. Ct. 800, 79 L. Ed. 1520, 100 A.L.R. 794 (1935).
- 4 [Ellinger v. Wisconsin Tax Com'n](#), 229 Wis. 71, 281 N.W. 701 (1938).

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#### B. Federal Taxes

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### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

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## 13 Am. Jur. 2d Business Trusts § 68

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### VIII. Taxation

### B. Federal Taxes

## § 68. Federal taxation of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

A trust having the attributes of a corporation will be treated for federal income tax purposes as an association and thus cognizable as a taxable entity.<sup>1</sup> For federal income tax purposes, a corporation is taxable as a separate and distinct entity from its shareholders if it was formed for a valid business reason or if it conducted any business activities after its formation.<sup>2</sup> Whether a corporation has been formed is a question of state law, but federal law determines whether a corporate entity should be disregarded for federal tax purposes.<sup>3</sup> Conversely, the fact that an entity is held taxable as an "association" under the Federal Internal Revenue Code does not control the treatment of the trust under trust law as to whether it is a Massachusetts business trust or merely an ordinary trust conducting a business.<sup>4</sup>

Special provisions govern the taxation of Real Estate Investment Trusts and their beneficiaries,<sup>5</sup> as well as dividends paid by a real estate investment trust after the close of the taxable year.<sup>6</sup>

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### Footnotes

- 1 [U.S. v. Crockett, 435 F.3d 1305 \(10th Cir. 2006\).](#)  
As to tests for determining whether trust is "association" for federal revenue taxation, see [§ 69](#).
- 2 [In re Coleman, 417 B.R. 712 \(Bankr. S.D. Miss. 2009\).](#)  
As to "business" test, see [§ 70](#).
- 3 [Eleanore Builders, Inc. v. U.S., 826 F. Supp. 1111 \(N.D. Ohio 1993\).](#)
- 4 [Matter of Trust Known as Great Northern Iron Ore Properties, 263 N.W.2d 610 \(Minn. 1978\).](#)
- 5 [26 U.S.C.A. § 857.](#)

A real estate investment trust (REIT) is an entity that may receive income from only particular real estate interests, including mortgages. [Associated Bank, N.A. v. Commissioner of Revenue, 914 N.W.2d 394 \(Minn. 2018\)](#).  
26 U.S.C.A. § 858.

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## 13 Am. Jur. 2d Business Trusts § 69

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### VIII. Taxation

### B. Federal Taxes

## § 69. Tests for determining whether trust an "association" for federal revenue taxation

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### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

Under the regulations governing the appropriate classification of a business entity for federal revenue purposes, federal law defines the characteristics by which a business entity will be deemed to more closely resemble a partnership, a trust, or an association; the focus of the court's inquiry is one of resemblance, and not whether it is identical in all respects to a corporation.<sup>1</sup> The substance of the distinction between a nontaxable trust and a business trust which is taxable as an association lies in the intrinsic nature of the enterprise and the relation of the several associates thereto rather than in the mere form of the association or in technical distinctions between corporations, partnerships, and the like.<sup>2</sup> The degree of control which the beneficiaries of a trust may exercise over the trustees or over the business or property of the trust is not determinative, and a business trust may be an "association" although the trustees are free from the control of the beneficiaries,<sup>3</sup> though more commonly, when the beneficiaries exercise a great deal of control, the organization is more likely to be deemed an association.<sup>4</sup> Also, mere size is not important in determining whether a trust is an association, taxable as a corporation under the revenue acts.<sup>5</sup> A trust may be an "association" under a federal tax statute even though the certificates of beneficial interest are held by only one person<sup>6</sup> or there is only one trustee.<sup>7</sup> The fact that the trust is engaged in a single enterprise or a limited number of operations does not necessarily prevent its being classed as an association within the statute.<sup>8</sup> Where a court is called upon to distinguish between a corporation and a partnership for purposes of tax liability, the classification is based on whether the entity exhibits at least three of the remaining four characteristics: continuity of life, centralization of management, limited liability, and free transferability of interests.<sup>9</sup>

### Practice Tip:

Whether or not a trust amounts to an "association," within the meaning of the federal revenue acts, depends in the final analysis upon the facts and circumstances of each individual case.<sup>10</sup> The dispositive question is whether the carrying on of business by the trust in a commercial sense is incidental to the paramount purpose of conserving or protecting property or whether the paramount purpose is conducting a business for profit.<sup>11</sup>

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#### Footnotes

- 1 Yamagata v. United States, 114 Fed. Cl. 159 (2014), *aff'd*, 603 Fed. Appx. 1009 (Fed. Cir. 2015).
- 2 Equitable Trust Co. v. Magruder, 37 F. Supp. 711 (D. Md. 1941).
- 3 Helvering v. Coleman-Gilbert Associates, 296 U.S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935); Helvering v. Combs, 296 U.S. 365, 56 S. Ct. 287, 80 L. Ed. 275 (1935); Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); Hecht v. Malley, 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924).  
As to control test, generally, see § 7.
- 4 Howard v. U.S., 5 Cl. Ct. 334 (1984), judgment *aff'd*, 770 F.2d 178 (Fed. Cir. 1985).
- 5 Swanson v. Commissioner of Internal Revenue, 296 U.S. 362, 56 S. Ct. 283, 80 L. Ed. 273 (1935); Commissioner of Internal Revenue v. Chase Nat. Bank of City of New York, 122 F.2d 540, 144 A.L.R. 1043 (C.C.A. 2d Cir. 1941).
- 6 Ittleon v. Anderson, 67 F.2d 323 (C.C.A. 2d Cir. 1933); Lombard Trustees v. Commissioner of Internal Revenue, 136 F.2d 22 (C.C.A. 9th Cir. 1943); Outlaw v. U. S., 204 Ct. Cl. 152, 494 F.2d 1376 (1974).
- 7 Brooklyn Trust Co. v. Commissioner of Internal Revenue, 80 F.2d 865 (C.C.A. 2d Cir. 1936).
- 8 Helvering v. Combs, 296 U.S. 365, 56 S. Ct. 287, 80 L. Ed. 275 (1935); Monrovia Oil Co. v. Commissioner of Internal Revenue, 83 F.2d 417 (C.C.A. 9th Cir. 1936); Commissioner of Internal Revenue v. Vandegrift Realty & Investment Co., 82 F.2d 387 (C.C.A. 9th Cir. 1936).
- 9 Yamagata v. United States, 114 Fed. Cl. 159 (2014), *aff'd*, 603 Fed. Appx. 1009 (Fed. Cir. 2015).
- 10 Keating-Snyder Trust v. C.I.R., 126 F.2d 860 (C.C.A. 5th Cir. 1942); Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2, 117 F.2d 619 (C.C.A. 6th Cir. 1941) (overruled on other grounds by, Abraham v. U.S., 406 F.2d 1259 (6th Cir. 1969)).
- 11 Howard v. U.S., 5 Cl. Ct. 334 (1984), judgment *aff'd*, 770 F.2d 178 (Fed. Cir. 1985).

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## 13 Am. Jur. 2d Business Trusts § 70

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### VIII. Taxation

### B. Federal Taxes

## § 70. Tests for determining whether trust an "association" for federal revenue taxation—"Business" test

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### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

The most important single element to be considered in determining whether a trust is an "association," so as to be taxable as a corporation under the Internal Revenue Code is whether the enterprise is created for the transaction of business; all the other criteria are subordinate to this primary and paramount test.<sup>1</sup> The test is whether the trust is a business concern and whether the shareholders or trustees or both are operating it in active business for profit.<sup>2</sup> The word "business," as used in this connection, connotes a commercial or industrial establishment or enterprise, as distinguished from "property," and means the activity, the energy, the capacity, and the opportunities by which results are reached.<sup>3</sup> For purposes of determining whether a trust is taxable as an association, concerted volitional activity on the part of those beneficially interested includes not only participation in the creation of the trust but also a subsequent affirmative entry into the enterprise through actions such as the purchase of beneficial interests.<sup>4</sup> The mere receipt of income by the trustee from trust property and the payment of charges and expenses does not constitute such "business" as will characterize a trust as an "association."<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Howard v. U.S.](#), 5 Cl. Ct. 334 (1984), judgment aff'd, 770 F.2d 178 (Fed. Cir. 1985); [Outlaw v. U. S.](#), 204 Ct. Cl. 152, 494 F.2d 1376 (1974).
- <sup>2</sup> [Smith v. Commissioner of Internal Revenue](#), 69 F.2d 911 (C.C.A. 3d Cir. 1934); [Reinecke v. Kaempfer](#), 72 F.2d 469 (C.C.A. 7th Cir. 1934); [U.S. v. Homecrest Tract](#), 160 F.2d 150 (C.C.A. 9th Cir. 1947); [Blume v. Gardner](#), 262 F. Supp. 405 (W.D. Mich. 1966), judgment aff'd, 397 F.2d 809 (6th Cir. 1968); [Howard v. U.S.](#), 5 Cl. Ct. 334 (1984), judgment aff'd, 770 F.2d 178 (Fed. Cir. 1985).
- <sup>3</sup> [Cleveland Trust Co. v. Commissioner of Internal Revenue](#), 115 F.2d 481 (C.C.A. 6th Cir. 1940).

- 4                   Howard v. U.S., 5 Cl. Ct. 334 (1984), judgment aff'd, 770 F.2d 178 (Fed. Cir. 1985).
- 5                   Commissioner of Internal Revenue v. Gibbs-Preyer Trusts Nos. 1 and 2, 117 F.2d 619 (C.C.A. 6th Cir. 1941)  
(overruled on other grounds by, Abraham v. U.S., 406 F.2d 1259 (6th Cir. 1969)); Cleveland Trust Co. v.  
Commissioner of Internal Revenue, 115 F.2d 481 (C.C.A. 6th Cir. 1940).

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## 13 Am. Jur. 2d Business Trusts § 71

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### Business Trusts

Karen L. Schultz, J.D.

### VIII. Taxation

#### B. Federal Taxes

## § 71. Tests for determining whether trust an "association" for federal revenue taxation—Corporate similitude; use of corporate forms or procedures

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

It is well accepted that for federal income tax purposes, a corporation is taxable as a separate and distinct entity from its shareholders if it was formed for a valid business reason or if it conducted any business activities after its formation.<sup>1</sup> Whether the purpose of incorporating be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.<sup>2</sup> For a corporation to be taxable as a separate and distinct entity from its shareholders, it is only necessary to satisfy one of the two parts of the Moline Properties test,<sup>3</sup> and the degree of corporate purpose and activity requiring recognition of the corporation as a separate entity for tax purposes under this test is extremely low.<sup>4</sup>

While the use of corporate forms may furnish persuasive evidence of the existence of an "association," the absence of particular forms or of the usual terminology of corporations is not decisive.<sup>5</sup> The question of the taxability of a trust as an association does not turn upon technical differences between the trust and a corporation in respect of their organizational structures; the determinant is rather the approximation of corporate advantages by the use of a trust instead of a corporation.<sup>6</sup> In determining whether a trust amounts to an "association" within the meaning of the federal revenue acts, it is not controlling that meetings are not held by the beneficiaries and that the trust has no office, place of business, seal, bylaws, or official name,<sup>7</sup> or that there are no formal meetings of trustees or directors,<sup>8</sup> or that their organization is of a loose and informal character.<sup>9</sup> The test of an association is not to be found in the mere form of the evidences or certificates of interest or in any particular method of transfer<sup>10</sup> and it is unimportant that no formal certificates of ownership were issued.<sup>11</sup> Limitation of the beneficiary's liability is not a sine qua non of the corporate analogy and the absence of such limitation does not necessarily preclude the status of "association,"<sup>12</sup> and as continuity of organization is an attribute of trusts as well as of corporations, this feature is not sufficient



in itself to characterize a trust as an "association."<sup>13</sup> However, an unincorporated organization may be classified as a corporation for tax purposes if it possesses a combination of these attributes.<sup>14</sup>

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## Footnotes

- 1 Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943); In re Coleman, 417 B.R. 712 (Bankr. S.D. Miss. 2009).
- 2 Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943); In re Coleman, 417 B.R. 712 (Bankr. S.D. Miss. 2009).
- 3 Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943); In re Coleman, 417 B.R. 712 (Bankr. S.D. Miss. 2009).
- 4 Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943); In re Coleman, 417 B.R. 712 (Bankr. S.D. Miss. 2009).
- 5 Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); Holder v. U.S., 289 F. Supp. 160 (N.D. Ga. 1968), judgment aff'd, 412 F.2d 1189 (5th Cir. 1969).  
The corporate form of an entity does not in itself determine its separate tax liability. Moline Properties v. Commissioner of Internal Revenue, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943); In re Coleman, 417 B.R. 712 (Bankr. S.D. Miss. 2009).  
As to nature of corporations, generally, see Am. Jur. 2d, Corporations §§ 1 to 5.
- 6 Pennsylvania Co for Insurances on Lives and Granting Annuities v. U S, 138 F.2d 869 (C.C.A. 3d Cir. 1943).
- 7 Helvering v. Combs, 296 U.S. 365, 56 S. Ct. 287, 80 L. Ed. 275 (1935); Keating-Snyder Trust v. C.I.R., 126 F.2d 860 (C.C.A. 5th Cir. 1942); Abraham v. U.S., 272 F. Supp. 807 (W.D. Tenn. 1967), judgment aff'd, 406 F.2d 1259 (6th Cir. 1969).
- 8 Keating-Snyder Trust v. C.I.R., 126 F.2d 860 (C.C.A. 5th Cir. 1942); Tyson v. Commissioner of Internal Revenue, 68 F.2d 584 (C.C.A. 7th Cir. 1933).
- 9 Tyson v. Commissioner of Internal Revenue, 68 F.2d 584 (C.C.A. 7th Cir. 1933).
- 10 Nashville Trust Co v. Cotros, 120 F.2d 157 (C.C.A. 6th Cir. 1941), opinion amended on other grounds, 122 F.2d 326 (C.C.A. 6th Cir. 1941).
- 11 Commissioner of Internal Revenue v. Fortney Oil Co., County Farm Lease, 125 F.2d 995 (C.C.A. 6th Cir. 1942); Sears, Roebuck & Co. Employees' Savings & Profit-Sharing Pension Fund v. Commissioner of Internal Revenue, 45 F.2d 506 (C.C.A. 7th Cir. 1930).  
As to shares and certificates of business trust, see §§ 15 to 19.
- 12 Bert v. Helvering, 92 F.2d 491 (App. D.C. 1937).  
As to liability of shareholders of business trust, see §§ 24 to 29.
- 13 Pennsylvania Co for Insurances on Lives and Granting Annuities v. U.S., 48 F. Supp. 969 (E.D. Pa. 1942), judgment aff'd, 146 F.2d 392 (C.C.A. 3d Cir. 1944); Outlaw v. U. S., 204 Ct. Cl. 152, 494 F.2d 1376 (1974).  
As to duration of business trust, see § 14.
- 14 MCA, Inc. v. U.S., 685 F.2d 1099 (9th Cir. 1982) (organization had to possess at least three of four corporate characteristics: limited liability, centralized management, free transferability of interests, and continuity of life); Outlaw v. U. S., 204 Ct. Cl. 152, 494 F.2d 1376 (1974).

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## 13 Am. Jur. 2d Business Trusts § 72

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### Business Trusts

Karen L. Schultz, J.D.

### VIII. Taxation

#### B. Federal Taxes

## § 72. Tests for determining whether trust an "association" for federal revenue taxation—Terms of trust instrument or activities of trustees

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Internal Revenue](#)  3623.1 to 3625

The character of a trust as an "association" for federal tax purposes is governed by the terms of the trust instrument since the powers of the trustees can be exercised by them to the full extent therein permitted<sup>1</sup> and that for the purpose of avoiding taxation as an "association" the parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted.<sup>2</sup> In other words, whether there is an association for the purpose of carrying on a business is to be determined from the trust instrument itself from what could be done under the trust and not from what was actually done<sup>3</sup> or what the parties to the instrument thought they could do.<sup>4</sup>

### Practice Tip:

Statements as to the status or objectives of a particular organization made by parties to an agreement may be considered but are not conclusive on the question of whether or not there exists an association taxable as a corporation since such statements may not be consistent with the powers granted in the instrument.<sup>5</sup>

Where a trust has the characteristics as well as the powers of a business trust, it cannot escape taxation by the failure to exercise such powers during the taxing period<sup>6</sup> since the trustees could, if they chose, exercise them.<sup>7</sup> On the other hand, a consideration of what the trustees actually do is not necessarily inconsistent with the foregoing principles.<sup>8</sup>

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Footnotes

- 1 [Morrissey v. Commissioner of Internal Revenue](#), 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); [Marshall's Heirs v. Commissioner of Internal Revenue](#), 111 F.2d 935 (C.C.A. 3d Cir. 1940).  
As to trust instrument in business trusts, see § 10.
- 2 [Helvering v. Coleman-Gilbert Associates](#), 296 U.S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935).  
As to purpose of business trust, see § 13.
- 3 [Abraham v. U.S.](#), 406 F.2d 1259 (6th Cir. 1969); [U.S. v. Homecrest Tract](#), 160 F.2d 150 (C.C.A. 9th Cir. 1947); [Howard v. U.S.](#), 5 Cl. Ct. 334 (1984), judgment aff'd, 770 F.2d 178 (Fed. Cir. 1985).
- 4 [Wholesalers Adjustment Co. v. Commissioner of Internal Revenue](#), 88 F.2d 156 (C.C.A. 8th Cir. 1937).
- 5 [Abraham v. U.S.](#), 272 F. Supp. 807 (W.D. Tenn. 1967), judgment aff'd, 406 F.2d 1259 (6th Cir. 1969).
- 6 [Morrissey v. Commissioner of Internal Revenue](#), 296 U.S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935).
- 7 [Marshall's Heirs v. Commissioner of Internal Revenue](#), 111 F.2d 935 (C.C.A. 3d Cir. 1940).
- 8 [Fidelity-Bankers Trust Co. v. Helvering](#), 113 F.2d 14 (App. D.C. 1940).

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## 13 Am. Jur. 2d Business Trusts IX Refs.

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### Business Trusts

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### IX. Termination and Dissolution

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3605, 3606

### A.L.R. Library

A.L.R. Index, Business Trusts

West's A.L.R. Digest, [Corporations and Business Organizations](#)  3605, 3606

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## 13 Am. Jur. 2d Business Trusts § 73

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### Business Trusts

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### IX. Termination and Dissolution

## § 73. Termination and dissolution of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3605, 3606

### Forms

Forms relating to termination or dissolution, generally, see Am. Jur. Legal Forms 2d, Business Trusts [\[Westlaw®\(r\) Search Query\]](#)

Trust instruments frequently provide a stated term for which a business trust is to operate or prescribe the conditions under which it will terminate, and thus, upon the happening of a certain event or the expiration of the term for which the trust is to continue, as in the case of trusts generally, the business trust will expire.<sup>1</sup> Where the instrument of trust provides for a definite period of existence, it may not be circumvented by the device of conveying the trust property to new trustees for a term longer than the residue of the original term.<sup>2</sup> The members of a business trust may dissolve it in accordance with the trust instrument<sup>3</sup> and may bring an action in equity to procure its dissolution.<sup>4</sup> A court of equity may, on a proper showing, decree the dissolution and liquidation of a business trust, prior to the time specified in the trust instrument for its termination.<sup>5</sup>

Frequently, the trust instrument provides that upon the expiration of the term of the trust the trustees will wind up the affairs of the trust, liquidate its assets, and distribute the proceeds among the shareholders.<sup>6</sup> Upon the termination of the trust, the functions and powers of the trustees as such come to an end, except for the purpose of winding up the business and distributing the remaining assets among the shareholders.<sup>7</sup>

Footnotes

- 1 [Hauser v. Catlett](#), 1946 OK 262, 197 Okla. 668, 173 P.2d 728 (1946).  
Alleged conduct by a real estate investment trust (REIT) of liquidating its property holdings in anticipation of a merger did not amount to a de facto liquidation of the REIT itself, as would entitle preferred shareholders to a liquidation preference in the certificate of designation; the language of the certificate indicated that only a formal dissolution could trigger the liquidation provision. [Kimeldorf v. First Union Real Estate Equity and Mortgage Investments](#), 309 A.D.2d 151, 764 N.Y.S.2d 73 (1st Dep't 2003).  
As to duration of business trust, see § 14.
- 2 [Hauser v. Catlett](#), 1946 OK 262, 197 Okla. 668, 173 P.2d 728 (1946).
- 3 [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).
- 4 [Melville v. Weybrew](#), 106 Colo. 121, 103 P.2d 7 (1940), *aff'd*, 108 Colo. 520, 120 P.2d 189 (1941); [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).
- 5 [Wiess v. McFaddin](#), 211 S.W. 337 (Tex. Civ. App. Beaumont 1919).
- 6 [Hamilton v. Young](#), 116 Kan. 128, 225 P. 1045, 35 A.L.R. 496 (1924).  
As to equitable action and relief in termination and dissolution of business trusts, see § 74.
- 7 [Cook v. Liberty Pipe Line Co.](#), 281 S.W. 221 (Tex. Civ. App. Fort Worth 1925), writ dismissed w.o.j., (Apr. 14, 1926).  
As to powers of trustees of business trust, see §§ 38 to 45.

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## 13 Am. Jur. 2d Business Trusts § 74

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### Business Trusts

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### IX. Termination and Dissolution

## § 74. Equitable action and relief in termination and dissolution of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3605, 3606

Although a court of general equity jurisdiction has the power to decree the termination of a business trust on the ground that it has expired by the terms of the trust instrument,<sup>1</sup> a court of equity will not decree the final dissolution of a business trust, contrary to the terms of the trust instrument, without a clear showing of necessity.<sup>2</sup> The facts that the trustees of a business trust are not pursuing the purposes of the trust and that they have paid no dividends to the shareholders, while perhaps proper to be considered in a proceeding to remove the trustees, are not a ground on which shareholders may maintain an action to dissolve the trust in the absence of a showing that the trust could not be continued under proper management.<sup>3</sup> A court of equity has inherent power to appoint a receiver to liquidate a business trust where fraud, mismanagement, or abuse of trust is present whether or not insolvency is likewise present.<sup>4</sup> One who holds all the outstanding shares of a trust can terminate the trust prior to its scheduled date of termination even though the power to do so is not reserved in the trust instrument and is against the objection of the sole trustee where the trust does not provide for distributions of either principal or income, and thus, there is no intention to provide assured and continuous support for the beneficiary during the life of the trust.<sup>5</sup> Moreover, the trustee cannot refuse to redeem one beneficiary's shares when he has already redeemed another beneficiary's shares.<sup>6</sup> A hopeless deadlock in the management of a trust, paralyzing its business and activities, may warrant a court in dissolving the trust before the expiration of its term.<sup>7</sup>

Where a court of equity has assumed jurisdiction of an action to dissolve a business trust, it may adjust all the rights between the parties and will retain jurisdiction until that end is accomplished.<sup>8</sup> In a representative suit to terminate a trust, the court may require an accounting by the trustees,<sup>9</sup> may enjoin the prosecution of other suits affecting the trust to avoid multiplicity of action,<sup>10</sup> and may partition the property of the trust among the parties.<sup>11</sup> A court has the authority to order a distribution in specie of business trust properties where the preservation intact of certain of those properties is essential to the successful operation of the parties' where the party opposing distribution in specie does so for the purpose of inflicting injury on the other party.<sup>12</sup>

Footnotes

- 1 [Melville v. Weybrew](#), 106 Colo. 121, 103 P.2d 7 (1940), [aff'd](#), 108 Colo. 520, 120 P.2d 189 (1941).
- 2 [Phoenix Oil Co. v. McLarren](#), 244 S.W. 830 (Tex. Civ. App. Fort Worth 1922).  
The court had the power to order the dissolution of a Massachusetts business trust at the request of one shareholder and over the objection of another where the cotrustee was bent on using his authority to injure the trust and to frustrate its business purpose in order to injure the other cotrustee and where there were no other shareholders or creditors whose rights could be affected by dissolution. [Nigro v. First Nat. Bank of Boston](#), 7 Mass. App. Ct. 903, 387 N.E.2d 1196 (1979).
- 3 [Myers v. Oklahoma Oil & Gas Royalty Co.](#), 1942 OK 121, 192 Okla. 620, 138 P.2d 109 (1942).
- 4 [Bailey v. Proctor](#), 160 F.2d 78 (C.C.A. 1st Cir. 1947).
- 5 [Papale-Keefe v. Altomare](#), 38 Mass. App. Ct. 308, 647 N.E.2d 722 (1995).
- 6 [Papale-Keefe v. Altomare](#), 38 Mass. App. Ct. 308, 647 N.E.2d 722 (1995).
- 7 [Regas v. Danigeles](#), 54 Ill. App. 2d 271, 203 N.E.2d 730 (1st Dist. 1964); [Wiess v. McFaddin](#), 211 S.W. 337 (Tex. Civ. App. Beaumont 1919).
- 8 [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).
- 9 [Deering v. Stites](#), 257 Ky. 403, 78 S.W.2d 46 (1934).
- 10 [Lincoln v. Superior Court of Madera County](#), 51 Cal. App. 2d 61, 124 P.2d 179 (3d Dist. 1942).
- 11 [Regas v. Danigeles](#), 54 Ill. App. 2d 271, 203 N.E.2d 730 (1st Dist. 1964); [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).
- 12 [Nigro v. First Nat. Bank of Boston](#), 7 Mass. App. Ct. 903, 387 N.E.2d 1196 (1979).

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## 13 Am. Jur. 2d Business Trusts X Refs.

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### Business Trusts

Karen L. Schultz, J.D.

### X. Receivership; Reorganization or Merger

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3604 to 3606

### A.L.R. Library

A.L.R. Index, Business Trusts

West's A.L.R. Digest, [Corporations and Business Organizations](#)  3604 to 3606

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## 13 Am. Jur. 2d Business Trusts § 75

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### Business Trusts

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### X. Receivership; Reorganization or Merger

## § 75. Receivership of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3604 to 3606

The general equitable principles permitting the appointment of a receiver by a court of equity when conditions warrant such action apply to business trusts.<sup>1</sup> Whether a receiver for a business trust will or will not be appointed ordinarily rests in the sound discretion of the trial court.<sup>2</sup> A court does not have the authority to order the appointment of a receiver to manage business trust properties on an indefinite basis where no other form of relief is additionally ordered.<sup>3</sup> The facts that such a trust is insolvent and that, unless prevented, the trustees will dissipate the assets of the trust estate constitute a ground for the appointment of a receiver for the trust.<sup>4</sup> Where a business trust is being mismanaged or is in danger of being lost to the shareholders through fraud, collusion, or mismanagement on the part of the trustees, a court of equity has the inherent power to appoint a receiver to take charge of the property and assets of the trust to prevent loss to the shareholders.<sup>5</sup>

Generally, the receiver of a business trust takes its assets subject to the equities which existed as against the trust.<sup>6</sup> The termination of a receivership also lies within the judicial discretion of the court, in the exercise of which the court will consider the rights and interests of all parties concerned.<sup>7</sup>

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### Footnotes

- 1 [Melville v. Weybrew](#), 106 Colo. 121, 103 P.2d 7 (1940), *aff'd*, 108 Colo. 520, 120 P.2d 189 (1941).
- 2 [Melville v. Weybrew](#), 106 Colo. 121, 103 P.2d 7 (1940), *aff'd*, 108 Colo. 520, 120 P.2d 189 (1941).
- 3 [Nigro v. First Nat. Bank of Boston](#), 7 Mass. App. Ct. 903, 387 N.E.2d 1196 (1979).
- 4 [Melville v. Weybrew](#), 106 Colo. 121, 103 P.2d 7 (1940), *aff'd*, 108 Colo. 520, 120 P.2d 189 (1941).
- 5 [Bailey v. Proctor](#), 160 F.2d 78 (C.C.A. 1st Cir. 1947); [State ex rel. Warren v. Douglas](#), 1939 OK 111, 185 Okla. 3, 89 P.2d 298 (1939); [Looney v. Doss](#), 189 S.W.2d 207 (Tex. Civ. App. Fort Worth 1945).
- 6 [Gray v. Lincoln Housing Trust](#), 229 Mich. 441, 201 N.W. 489 (1924).

7 [Looney v. Doss, 189 S.W.2d 207 \(Tex. Civ. App. Fort Worth 1945\).](#)

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## 13 Am. Jur. 2d Business Trusts § 76

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### Business Trusts

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### X. Receivership; Reorganization or Merger

## § 76. Reorganization or merger of business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3604

There may be a merger of several business trusts<sup>1</sup> which may be effected by implication from the manner in which the businesses of the several trusts are conducted.<sup>2</sup>

Upon the reorganization of a Massachusetts or business trust, nonassenting shareholders cannot be forced to surrender their shares for shares in the new trust without being given the option of receiving payment for the value of their shares in the original trust.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Page v. Arkansas Natural Gas Corp.](#), 53 F.2d 27 (C.C.A. 8th Cir. 1931), *aff'd*, 286 U.S. 269, 52 S. Ct. 507, 76 L. Ed. 1096 (1932).

A real estate investment trust (REIT) did not owe a fiduciary duty to preferred share owners in the context of the REIT's merger with another entity; the preferred share owners received mirror stock in the merged entity, no valuation was involved, and the shareholders' rights were therefore a matter of contract. [Kimeldorf v. First Union Real Estate Equity and Mortgage Investments](#), 309 A.D.2d 151, 764 N.Y.S.2d 73 (1st Dep't 2003).

<sup>2</sup> [Page v. Arkansas Natural Gas Corp.](#), 53 F.2d 27 (C.C.A. 8th Cir. 1931), *aff'd*, 286 U.S. 269, 52 S. Ct. 507, 76 L. Ed. 1096 (1932).

Although minority unit-holders in a real estate investment trust were entitled to a class vote on amendments, the absence of a class vote on a merger with a newly created entity did not constitute a breach of declaration of trust because nothing was amended until after the merger and termination of the units, Maryland law did not entitle the minority unit-holders to a class vote on the merger, and the trust had enough units to approve the merger, which resulted in the termination of the minority units, without a class vote of minority unit-holders. [Stender v. Archstone-Smith Operating Trust](#), 910 F.3d 1107 (10th Cir. 2018) (applying Maryland law).

3 [Hauser v. Catlett, 1946 OK 262, 197 Okla. 668, 173 P.2d 728 \(1946\).](#)

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## 13 Am. Jur. 2d Business Trusts § 77

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### Business Trusts

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#### X. Receivership; Reorganization or Merger

### § 77. Incorporation of business trusts; merger with, or transfer to, corporation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3604

Where the terms of the trust instrument authorize it, a business trust may be reorganized by the creation of a corporation, the conveyance of the trust property to the corporation and the distribution of the corporate shares among the shareholders of the trust according to their respective interests.<sup>1</sup> The trustees will be enjoined from carrying out a plan for the reorganization of the business in the form of a corporation where the powers and objects of the corporation are substantially broader than the objects of the trust and the power of the trustees thereunder.<sup>2</sup> No court has jurisdiction simply to rewrite a contract at the behest of dissident parties or to convert their trust indenture into a corporation in the absence of practically unanimous consent.<sup>3</sup> A corporation organized to take over the business and property of a business trust and to which the property of the trust is conveyed takes such property subject to the rights and claims of the creditors of the trust<sup>4</sup> and a creditor of a business trust may maintain an action for discovery to determine what assets have been transferred by the trust to a corporation organized by those interested in the trust.<sup>5</sup>

#### Practice Tip:

Reliance by the trustees of a real estate investment trust on an independent opinion in deciding to merge the trust with a corporation is a defense to a charge of unfairness.<sup>6</sup>

Footnotes

- 1 [Carpenter v. White](#), 80 F.2d 145 (C.C.A. 1st Cir. 1935) (applying Massachusetts law); [Bryan v. Hamrick](#), 106 F.2d 245 (C.C.A. 10th Cir. 1939); [Thomle v. Soundview Pulp Co.](#), 181 Wash. 1, 42 P.2d 19 (1935).
- 2 [Bryan v. Hamrick](#), 106 F.2d 245 (C.C.A. 10th Cir. 1939).  
As to purpose of business trust, see § 13.
- 3 [Hood v. James](#), 256 F.2d 895 (5th Cir. 1958).
- 4 [Ashworth v. Hagan Estates](#), 165 Va. 151, 181 S.E. 381 (1935).
- 5 [National Sur. Co. v. Anacostia Finance Corp.](#), 26 F.2d 985 (App. D.C. 1928).
- 6 [Landy v. Amsterdam](#), 815 F.2d 925 (3d Cir. 1987) (applying Pennsylvania law).

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## 13 Am. Jur. 2d Business Trusts XI A Refs.

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### Business Trusts

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#) 🔑 3592, 3603

### A.L.R. Library

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## 13 Am. Jur. 2d Business Trusts § 78

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### Business Trusts

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### XI. Practice and Procedure

#### A. Actions Between Trust and Third Persons

## § 78. Jurisdiction and venue in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

### Forms

Forms relating to business trust complaints, generally, see Am. Jur. Pleading and Practice Forms, Business Trusts  
[\[Westlaw®\(r\): Search Query\]](#)

An action involving the ownership of shares by and the removal of the trustee of a business trust lies in the county of the defendant's residence.<sup>1</sup> However, where two trustees who are properly served with process in an action against a business trust enter the appearance of the trust, they thereby waive the right to have the suit tried in another county and a third trustee subsequently has no right to have the venue changed.<sup>2</sup> A statute may provide that suits against business trusts may be brought in the county in which the cause of action arose.<sup>3</sup> A court having jurisdiction of the trustees may adjudicate title to trust property lying beyond the jurisdiction of the court.<sup>4</sup>

Jurisdiction of an action instituted in a federal court in the name of the trustees of a business trust will be governed by the residence of the trustees rather than of the shareholders even though the latter may have the beneficial interest and ultimate power of control of the business.<sup>5</sup> However, by answering to the merits of a local action, a foreign business trust waives objection to the jurisdiction of the federal district court on the ground of the nonresidence of the defendant.<sup>6</sup> For purposes of determining federal jurisdiction based on diversity of citizenship, the citizenship of a business trust is that of each of the owners of beneficial interest.<sup>7</sup>

**Observation:**

When deciding whether, for determining citizenship for diversity jurisdiction purposes, a trust is of the "traditional" or "business" variety, the court ought to look to the law of the state where the trust was formed to determine whether the trust has the status of a person; comparing the state law on business trusts and more traditional trust relationships may facilitate a determination of which type is better suited to describe the trust at issue, but the particular labels affixed by state law are not of themselves determinative.<sup>8</sup>

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**Footnotes**

- 1 [Averill v. Lincoln](#), 52 Cal. App. 2d 398, 126 P.2d 398 (3d Dist. 1942).
- 2 [Limpia Royalties v. Cowden](#), 94 S.W.2d 481 (Tex. Civ. App. El Paso 1936).  
As to process in actions involving business trusts, see § 81.
- 3 [Fort Worth Steel & Machinery Co. v. Norsworthy](#), 570 S.W.2d 132 (Tex. Civ. App. Tyler 1978), dismissed, (Nov. 7, 1979).  
To maintain venue against a private corporation, association, or joint-stock company in the county where the cause of action or part thereof arose, some part of the transaction creating the primary right, or some part of the transaction relating to a breach of that right must have occurred in the county where the suit is brought. [American Quarter Horse Ass'n v. Rose](#), 525 S.W.2d 227 (Tex. Civ. App. Fort Worth 1975).
- 4 [Elsom v. Tefft](#), 140 Wash. 586, 250 P. 346 (1926).
- 5 [Simson v. Klipstein](#), 262 F. 823 (D.N.J. 1920).
- 6 [Ferdig Oil Co. v. Wilson](#), 91 F.2d 857 (C.C.A. 10th Cir. 1937).
- 7 [Jim Walter Investors v. Empire-Madison, Inc.](#), 401 F. Supp. 425 (N.D. Ga. 1975); [Carey v. U.S. Industries, Inc.](#), 414 F. Supp. 794 (N.D. Ill. 1976); [Fox v. Prudent Resources Trust](#), 382 F. Supp. 81, 19 Fed. R. Serv. 2d 447 (E.D. Pa. 1974); [Lawrin Mortg. Investors v. Riverdrive Mall, Inc.](#), 392 F. Supp. 97 (S.D. Tex. 1975).
- 8 [GBForefront, L.P. v. Forefront Management Group, LLC](#), 888 F.3d 29 (3d Cir. 2018).  
As to distinction between business trust and ordinary trust, see § 5.

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## 13 Am. Jur. 2d Business Trusts § 79

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#### A. Actions Between Trust and Third Persons

## § 79. Plaintiffs in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

It generally is held that the trustees of a business trust are the proper parties plaintiff in an action to vindicate or enforce the rights of the trust estate and that they may maintain such an action without the joinder of the shareholders<sup>1</sup> and trust instruments frequently contain provisions to this effect.<sup>2</sup> Thus, the trustees are the proper parties to maintain an action on behalf of the trust for breach of contract,<sup>3</sup> for the protection of trust property,<sup>4</sup> or to recover for damages.<sup>5</sup> They may maintain actions to recover for any wrongful impairment of the corpus of the trust<sup>6</sup> or to quiet title to the real property of the trust.<sup>7</sup> Even though the trustees of a business trust may maintain an action in their own names when such an action is brought for the benefit of others the complaint should so allege, and in such a case, the beneficiaries of the trust are the real parties in interest.<sup>8</sup>

The trustees of a business trust may maintain an action on behalf of the trust in its adopted trade or business name,<sup>9</sup> and in some states, statutes expressly authorize such an organization to sue and be sued in its own name.<sup>10</sup> Under such a statute, a business trust may maintain in its own name a suit to enjoin a threatened breach of contract with it and a trespass on its property.<sup>11</sup> Where the right of a business trust to maintain an action in its company or distinguishing name depends upon compliance with a fictitious name statute, failure of the trust to comply with such statute is merely grounds for abating the action until the statute is complied with and not sufficient reason for dismissal of the action.<sup>12</sup>

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### Footnotes

- <sup>1</sup> [Brickell Const. Corp. v. Pujol](#), 329 So. 2d 340 (Fla. 3d DCA 1976); [Schwartz v. Abbott Motors, Inc.](#), 344 Mass. 28, 181 N.E.2d 334 (1962); [Morriss v. Finkelstein](#), 127 S.W.2d 46 (Mo. Ct. App. 1939).

- 2 Jensen v. Hugh Evans & Co., 18 Cal. 2d 290, 115 P.2d 471 (1941); Forgan v. Mackie, 232 Mich. 476, 205 N.W. 600 (1925).  
Investment trusts may hold property in their own name, but other powers, such as the power to sue, are vested in the trustee. *In re Schmeglar*, 531 B.R. 735 (Bankr. N.D. Ill. 2015), judgment aff'd, 2016 WL 1020322 (N.D. Ill. 2016) (applying New York law).  
As to trust instrument in business trusts, see § 10.
- 3 Powell v. Hammon Consol. Gold Fields, 8 Alaska 153, 1929 WL 1143 (Terr. Alaska 1929); Simson v. Klipstein, 262 F. 823 (D.N.J. 1920); Schwartz v. Abbott Motors, Inc., 344 Mass. 28, 181 N.E.2d 334 (1962); Morriss v. Finkelstein, 127 S.W.2d 46 (Mo. Ct. App. 1939).  
Where a note and mortgage were executed naming as payee one trustee to a foreign business trust and not more, such trustee was entitled to maintain an action on the note and mortgage and to discharge the obligation, and each trustee did not have to be named as a plaintiff. *Your Const. Center, Inc. v. Gross*, 316 So. 2d 596 (Fla. 4th DCA 1975).  
As to power of business trustees to make contracts, see § 42.
- 4 Powell v. Hammon Consol. Gold Fields, 8 Alaska 153, 1929 WL 1143 (Terr. Alaska 1929); Elsom v. Tefft, 140 Wash. 586, 250 P. 346 (1926).  
As to power of business trustees to acquire and administer property, see § 43.
- 5 Simson v. Klipstein, 262 F. 823 (D.N.J. 1920).
- 6 Peterson v. Hopson, 306 Mass. 597, 29 N.E.2d 140, 132 A.L.R. 1 (1940).
- 7 Denny v. Cascade Platinum Co., 133 Wash. 436, 232 P. 409 (1925).
- 8 Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (3d Dist. 1946).  
An action to foreclose a mortgage payable to a business trust, which was organized under another state's laws but which was qualified in the forum state, could not be maintained by the trustees alone; the trust had to be made a party plaintiff. *Corcoran v. Brody*, 347 So. 2d 689 (Fla. 4th DCA 1977).
- 9 Stevens v. Sharpe, 1938 OK 425, 183 Okla. 312, 82 P.2d 672 (1938); Grenco Real Estate Inv. Trust v. Brooker, 215 Va. 413, 211 S.E.2d 33 (1975).  
As to name of business trust, see § 11.
- 10 Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 46 S. Ct. 48, 70 L. Ed. 183 (1925) (applying Texas law); Bourexix v. Carroll County Narcotics Task Force, 96 Md. App. 459, 625 A.2d 391 (1993); Grenco Real Estate Inv. Trust v. Brooker, 215 Va. 413, 211 S.E.2d 33 (1975).
- 11 Graham v. Omar Gasoline Co., 253 S.W. 896 (Tex. Civ. App. Fort Worth 1923).
- 12 Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App. 2d 796, 167 P.2d 518 (3d Dist. 1946).

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## 13 Am. Jur. 2d Business Trusts § 80

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### XI. Practice and Procedure

#### A. Actions Between Trust and Third Persons

## § 80. Defendants in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

Where a business trust organization is a true trust so that the trustees are personally liable for its debts, an action may be maintained against a trustee in his own name without joining the beneficiaries as parties defendant,<sup>1</sup> and the same has been held to be true in a jurisdiction where business trusts are treated as partnerships.<sup>2</sup> Trust instrument provisions may determine the necessary parties in an action against a business trust and thus, where the trust instrument gives the trustees the power to sue and be sued, an action is maintainable against them without joining the shareholders.<sup>3</sup> Some statutes expressly authorize actions against business trusts in their adopted names.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Connally v. Lyons](#), 82 Tex. 664, 18 S.W. 799 (1891).  
As to liability of trustees to third parties, generally, see §§ 50 to 54.
- <sup>2</sup> [Richardson v. Beasley](#), 50 S.W.2d 420 (Tex. Civ. App. Texarkana 1932).
- <sup>3</sup> [Rothbart v. Metropolitan Trust Co.](#), 307 Ill. App. 271, 30 N.E.2d 183 (1st Dist. 1940); [Houston Oil Co. of Texas v. Village Mills Co.](#), 241 S.W. 122 (Tex. Comm'n App. 1922).
- <sup>4</sup> [Burk-Waggoner Oil Ass'n v. Hopkins](#), 269 U.S. 110, 46 S. Ct. 48, 70 L. Ed. 183 (1925) (applying Texas law); [Bourex v. Carroll County Narcotics Task Force](#), 96 Md. App. 459, 625 A.2d 391 (1993); [State Street Trust Co. v. Hall](#), 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 (1942); [Williams v. Schulte](#), 103 S.W.2d 543 (Mo. Ct. App. 1937).

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## 13 Am. Jur. 2d Business Trusts § 81

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### Business Trusts

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### XI. Practice and Procedure

#### A. Actions Between Trust and Third Persons

## § 81. Service of process in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

In an action against a business trust or its trustees, service of process may be made upon the trustees.<sup>1</sup> While, by statute, the shareholders are bound, as to their beneficial interest in the trust, by a judgment against the trust in its adopted name, service must be had on them in order to obtain a judgment against the shareholders in their individual capacities.<sup>2</sup> Where after service of process upon the trustees in their official capacity the complaint is amended so as to seek relief against them personally, there must be service of process upon them in their private or individual capacities in order to give the court jurisdiction to enter personal judgments against them.<sup>3</sup>

Service upon a business trust organized in another state may be made upon its trustees.<sup>4</sup> Some statutes provide for service upon foreign trusts in the same manner as service is had upon foreign corporations,<sup>5</sup> though other jurisdictions do not permit service upon a foreign business trust in the manner applicable to service on a foreign corporation.<sup>6</sup> Service of process on a foreign business trust under provisions of a local long-arm statute is effective,<sup>7</sup> though there is authority to the contrary.<sup>8</sup>

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### Footnotes

- <sup>1</sup> [Linn v. Houston](#), 123 Kan. 409, 255 P. 1105 (1927); [Golden West Oil Co. No. 1 v. Golden Rod Oil Co. No. 1](#), 285 S.W. 631 (Tex. Civ. App. Waco 1926), [aff'd](#), 285 S.W. 627 (Tex. Civ. App. Fort Worth 1925) and writ granted, (Oct. 27, 1926) and [aff'd](#), 293 S.W. 167 (Tex. Comm'n App. 1927).
- <sup>2</sup> [Brown v. Gorman Home Refinery](#), 276 S.W. 787 (Tex. Civ. App. Fort Worth 1925), writ granted, (Dec. 2, 1925) and [aff'd](#), 285 S.W. 307 (Tex. Comm'n App. 1926).
- <sup>3</sup> [Cochrane v. Forbes](#), 265 Mass. 249, 163 N.E. 848 (1928).

- 4                    Boyd v. Boulevard Nat. Bank, 306 So. 2d 551 (Fla. 3d DCA 1975); Linn v. Houston, 123 Kan. 409, 255 P. 1105 (1927).
- 5                    American Ry. Exp. Co. v. Asher, 218 Ky. 172, 291 S.W. 21 (1927); State v. Edward Hines Lumber Co., 150 Miss. 1, 115 So. 598 (1928).
- 6                    Vischer v. Dow Jones & Co., 325 Ill. App. 104, 59 N.E.2d 884 (1st Dist. 1945).
- 7                    As to regulation of business trusts under statutes relating to foreign corporations, see § 61.
- 8                    General Heat & Power Co., Inc. v. Diversified Mortg. Investors, 552 F.2d 556 (3d Cir. 1977).
- Lafayette Bank & Trust Co. v. Branchini & Sons Const. Co., Inc., 32 Conn. Supp. 124, 342 A.2d 916 (Super. Ct. 1975).

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## 13 Am. Jur. 2d Business Trusts § 82

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### XI. Practice and Procedure

#### A. Actions Between Trust and Third Persons

## § 82. Pleading and proof in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

Where the plaintiff pleads all the necessary elements to render the trustees liable on an obligation of the trust, the defendants in their answer must plead the facts on which they base their claim of exemption since the plaintiff need not negative a defense founded on an exception to the rule that such trustees are personally liable in the absence of an agreement to the contrary<sup>1</sup> nor is a person seeking recovery against trustees personally under a contract made by them required to negative knowledge on his part of a provision of the trust agreement purporting to exempt the trustees from liability.<sup>2</sup> The law of another state alleged to differ from the law of the forum, governing the liability of members of a business trust, is not available where there is no pleading or proof thereof; in the absence of such pleading and proof the court will presume that the foreign law is the same as the common law of the forum.<sup>3</sup> In order to avail himself of a defense based on the failure of the plaintiff, a business trust organized in another state to comply with the statutes of such state, a defendant must plead the statute.<sup>4</sup> Conclusions by the pleader as to the power of the trustees will be treated as surplusage where the trust instrument is pleaded in full and is contrary to the conclusions thus pleaded,<sup>5</sup> and the same is true of conclusions with respect to the status of the organization as a true trust or a partnership.<sup>6</sup>

Extrinsic evidence is admissible to show the intention of the contracting parties with respect to the question whether or not the trustee was to be exempted from personal liability on a contract made on behalf of a business trust.<sup>7</sup> Where the contract is ambiguous on the question of the personal liability of the trustees thereon, the question should be submitted to the jury with evidence of the surrounding circumstances and the concurrent dealings of the parties.<sup>8</sup> In an action by a business trust on a contract, it is not required to establish by positive proof its compliance in detail with the provisions of a statute relating to the manner of executing an instrument creating a business trust.<sup>9</sup>



Footnotes

- 1 [People v. Sischo](#), 31 Cal. App. 2d 345, 87 P.2d 862 (3d Dist. 1939).
- 2 [Review Printing & Stationery Co. v. McCoy](#), 276 Ill. App. 580, 1934 WL 2949 (2d Dist. 1934).  
As to liability of trustees to third parties, generally, see §§ 50 to 54.
- 3 [Dunning v. Gibbs](#), 213 Ky. 81, 280 S.W. 483 (1926).  
As to what law governs business trusts, see § 4.
- 4 [Morris v. Finkelstein](#), 127 S.W.2d 46 (Mo. Ct. App. 1939).
- 5 [Alphonzo E. Bell Corp. v. Bell View Oil Syndicate](#), 46 Cal. App. 2d 684, 116 P.2d 786 (1st Dist. 1941).  
As to powers and functions of trustees of business trust, see §§ 38 to 45.
- 6 [Farmers' & Merchants' Nat. Bank of Fort Worth, Tex. v. Anderson](#), 216 Iowa 988, 250 N.W. 214 (1933).
- 7 [In re Winter's Estate](#), 133 N.J. Eq. 245, 31 A.2d 769 (Prerog. Ct. 1943), decree aff'd by, 136 N.J. Eq. 112, 40 A.2d 648 (Ct. Err. & App. 1945); [George v. Hall](#), 262 S.W. 174 (Tex. Civ. App. San Antonio 1924).
- 8 [Wm. Lindeke Land Co. v. Kalman](#), 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).
- 9 [General American Oil Co. v. Wagoner Oil & Gas Co.](#), 1925 OK 821, 118 Okla. 183, 247 P. 99 (1926).

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## 13 Am. Jur. 2d Business Trusts § 83

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#### A. Actions Between Trust and Third Persons

## § 83. Trial and judgment in actions involving business trusts

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### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3603

In a jurisdiction in which a business trust may be sued in its adopted name, it follows that a judgment may be rendered against the trust in that name.<sup>1</sup> The dismissal of the claim of personal liability against a trustee does not prevent the entry of a judgment against the trust.<sup>2</sup> Where the trust instrument authorizes two of the three trustees to act for the trust, the trust is bound by a judgment entered in an action defended by two trustees.<sup>3</sup> Trustees against whom a judgment is rendered on the theory that they were partners have no right to complain of the failure of the court to render judgment also against a shareholder of the trust.<sup>4</sup> A judgment for the plaintiff in an action by trustees on behalf of a business trust is not subject to the objection of indefiniteness or uncertainty where the trust is bound by the judgment and the defendant is protected against further liability.<sup>5</sup> The individual property of a trustee may be seized on execution to satisfy a judgment against him on a debt or obligation of the trust estate.<sup>6</sup> A statute may provide that in a suit against an organization in the nature of a business trust, a judgment against it will be equally binding upon the individual property of the shareholders or members who have been served with citation in the suit.<sup>7</sup>

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### Footnotes

- 1 [American Ry. Exp. Co. v. Asher](#), 218 Ky. 172, 291 S.W. 21 (1927).  
As to name of business trust, see § 11.
- 2 [Waurika Oil Ass'n v. Ellis](#), 267 S.W. 523 (Tex. Civ. App. Amarillo 1924).  
As to liability of trustees to third parties, generally, see §§ 50 to 54.
- 3 [Houston Oil Co. of Texas v. Village Mills Co.](#), 241 S.W. 122 (Tex. Comm'n App. 1922).  
As to manner of functioning by trustees of business trust; unanimous, joint, or individual action, see § 39.
- 4 [McClaren v. Dawes Electric Sign & Mfg. Co.](#), 86 Ind. App. 196, 156 N.E. 584 (1927).

- 5                    Smith v. Higginbotham, 141 S.W.2d 752 (Tex. Civ. App. Dallas 1940), judgment aff'd, 138 Tex. 227, 158  
S.W.2d 481 (Comm'n App. 1942).
- 6                    Walker v. Hatfield, 17 S.W.2d 357 (Mo. Ct. App. 1929).
- 7                    Cunningham v. Carpenter, 258 S.W. 607 (Tex. Civ. App. Fort Worth 1923).

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## 13 Am. Jur. 2d Business Trusts XI B Refs.

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### Business Trusts

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### XI. Practice and Procedure

#### B. Shareholders' Actions

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## 13 Am. Jur. 2d Business Trusts § 84

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### XI. Practice and Procedure

#### B. Shareholders' Actions

## § 84. Direct shareholder actions involving business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3592, 3597, 3603

The holder of preferred shares in a business trust may maintain an action against the trust to enforce his or her rights thereunder;<sup>1</sup> a shareholder can maintain a bill in equity to compel the trustees to perform their duty to distribute accrued profits.<sup>2</sup> When a shareholder makes a more favorable offer to purchase shares from some shareholders than from others, a case for unlawful shareholder discrimination is warranted.<sup>3</sup> For the purpose of fixing the venue of an action between shareholders in a business trust, the organization is not treated as a partnership.<sup>4</sup> Also, in an action between shareholders, the defendants are not bound by a judgment rendered in another state in an action against other shareholders to which such defendants were not parties.<sup>5</sup> In a shareholder's action seeking reorganization and eventual incorporation of a business trust, it is improper to omit as parties shareholders residing in a certain state so as to create the diversity of citizenship necessary to give federal jurisdiction where such omitted shareholders could conveniently have been joined as parties.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Greenspun v. Lindley](#), 44 A.D.2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), order aff'd, 36 N.Y.2d 473, 369 N.Y.S.2d 123, 330 N.E.2d 79, 88 A.L.R.3d 697 (1975) (applying Massachusetts law); [Patterson v. Witter](#), 425 S.C. 213, 821 S.E.2d 677 (2018); [Wineinger v. Farmers' & Stockmen's Loan & Investment Ass'n](#), 287 S.W. 1091 (Tex. Comm'n App. 1926).

A claim against a mutual fund investment advisor for breach of fiduciary duty, alleging deviation from two fundamental investment objectives that required shareholder vote change, without first obtaining shareholder approval, which caused diminution in the shareholder value, could be brought as a direct action, rather than a derivative action, where the impact was directly on the investors in the fund and recovery would not be dependent on demonstrating injury to the investment trust. [Northstar Financial Advisors Inc. v. Schwab](#)

[Investments](#), 779 F.3d 1036, 91 Fed. R. Serv. 3d 315 (9th Cir. 2015), as amended on denial of reh'g and reh'g en banc, (Apr. 28, 2015) (applying Massachusetts law).

Investors' claims against a mortgage-loan servicer and its affiliates for mismanagement of mortgages underlying real estate mortgage investment conduit (REMIC) securitization trusts, which investors terminated after having been allegedly fraudulently induced to buy out other certificate holders, were direct claims, and thus were not subject to derivative pleading standards, as the claims sought relief for the investors' own unique injuries, chief among them payment to the servicer of servicing advances. [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011).

As to classes of shares in a business trust, see § 16.

As to rights of shareholders of business trust, see §§ 22, 23.

2 [Taber v. Breck](#), 192 Mass. 355, 78 N.E. 472 (1906).

3 [Twenty Seven Trust v. Realty Growth Investors](#), 533 F. Supp. 1028 (D. Md. 1982).

4 [Ziegelmeyer v. Joyce](#), 97 S.W.2d 346 (Tex. Civ. App. El Paso 1936).

5 [Darling v. Buddy](#), 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 (1927).

6 [Hood v. James](#), 256 F.2d 895 (5th Cir. 1958).

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## 13 Am. Jur. 2d Business Trusts § 85

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### Business Trusts

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### XI. Practice and Procedure

#### B. Shareholders' Actions

## § 85. Representative or derivative actions involving business trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Corporations and Business Organizations](#)  3597

The doctrine of virtual representation applies to actions by minority shareholders of a business trust and permits a part of the shareholders to maintain an action against the trustees for the benefit and as representatives of all of the shareholders.<sup>1</sup> In some states, derivative suits may be brought by the beneficiaries of a trust.<sup>2</sup> Thus, shareholders may maintain a suit for an injunction against the trustees to prevent them from wasting, destroying, and dissipating the trust estate.<sup>3</sup>

Minority shareholders in a business trust challenging an act of the trustees on the ground that they breached their fiduciary duty by self-dealing have the burden of making a preliminary showing that the transaction was unfair.<sup>4</sup> Thus, in a derivative action brought by minority shareholders against trustees, such minority shareholders have the burden of proving any misappropriation or mismanagement by the trustees, as well as the burden of proving any harm to the trust which might have resulted from any such misappropriation or mismanagement.<sup>5</sup> A shareholder of an organization in the nature of a business trust may maintain a representative action against a director thereof to recover on account of the latter's fraud without procuring or seeking a dissolution of the alleged "partnership."<sup>6</sup> A shareholder also may maintain a suit to recover on account of the systematic exploitation of the trust by persons dominating the same and to preserve and restore its assets, although he acquired his stock after the occurrence of the acts complained of.<sup>7</sup> Shareholders are also entitled to proceed in equity for the rescission of transfers of trust property made under circumstances tinged with improper dealing where the trustees fail to take appropriate action for the benefit of the trust.<sup>8</sup>

The applicability of presuit demand and pleading requirements of the rule governing derivative actions by shareholders are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative.<sup>9</sup> Generally, a shareholder may not pursue a derivative suit to assert a claim of a trust unless the shareholder (1) has first demanded that the trustees pursue the trust's claim and the trustees have wrongfully refused to do so, or (2) establishes

that presuit demand is excused because the trustees are deemed incapable of making an impartial decision regarding pursuit of the litigation.<sup>10</sup> While a prior demand upon and refusal by the trustees to bring the suit generally is a condition precedent to the right of shareholders to maintain a suit on behalf of themselves and of the trust, such demand and refusal are not essential where the circumstances make it clear that the demand would be refused.<sup>11</sup>

Where a shareholder brings a bill to seek redress of wrongs done to the trust, however, his rights are derivative and he must show some wrong to the trust.<sup>12</sup> A minority shareholder has no right to maintain a suit to compel the performance of a contract for the conveyance of trust lands where the trust agreement vested in the trustee, under the direction of the majority of the shareholders, discretion as to whether to enforce the contract of sale or to retain and distribute the lands.<sup>13</sup> The recovery of assets in a shareholders' class suit inures to the benefit of the trust estate and so, indirectly, to all its shareholders, without priority of one over the other,<sup>14</sup> and shareholders are concluded by a judgment in a proper representative action against the trustees.<sup>15</sup>

When a trust agreement expressly provides that the laws of a foreign state should be controlling, that foreign state's law governs a shareholders' derivative action even if the trust has significant contacts in the forum state.<sup>16</sup>

In a suit by minority shareholders of a business trust against the trustees, seeking an accounting, the appointment of a receiver, and a winding up of the affairs of the trust, it is not necessary to make all of the shareholders parties.<sup>17</sup> So, too, one of several beneficiaries of a business trust may maintain an action for removal of a trustee without the necessity of joining the other beneficiaries; while all of the beneficiaries are proper parties, they are not indispensable parties.<sup>18</sup> Also, in a suit by shareholders against the trustees of a business trust for an accounting by the latter, for the recovery of sums misappropriated or lost by the trustees, and for the appointment of a receiver, the trust, in its distinctive name, is not a necessary party.<sup>19</sup>

The present trustee of a business trust is a proper party to an action by a shareholder to vindicate the rights of the trust and to preserve and restore its assets,<sup>20</sup> and a proceeding to remove a trustee is adversary in character, requiring that the trustee sought to be removed be made a party and be given notice of the proceeding.<sup>21</sup> However, a proceeding to fill an existing vacancy or to accept the resignation of a trustee and appoint a successor may sometimes be ex parte.<sup>22</sup>

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## Footnotes

- 1 [Landy v. Amsterdam](#), 815 F.2d 925 (3d Cir. 1987) (applying Pennsylvania law); [Greenspun v. Lindley](#), 44 A.D.2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), order aff'd, 36 N.Y.2d 473, 369 N.Y.S.2d 123, 330 N.E.2d 79, 88 A.L.R.3d 697 (1975) (applying Massachusetts law); [Patterson v. Witter](#), 425 S.C. 213, 821 S.E.2d 677 (2018); [Davis v. Hudgins](#), 225 S.W. 73 (Tex. Civ. App. Dallas 1920).  
As to derivative actions, generally, see *Am. Jur. 2d, Corporations* §§ 1932 to 1941.
- 2 [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011) (stockholder's action must be asserted derivatively if the alleged injury was suffered by the corporation and thus by stockholders only through diminution in the value of their shares, and directly if the injury was suffered in some fashion separately and distinctly from injury to the corporation).  
As to direct shareholder actions involving business trusts, see § 84.
- 3 [Woodward v. Smith](#), 253 S.W. 847 (Tex. Civ. App. Austin 1923).  
As to trustee's duties to trust and shareholders, see §§ 46 to 49.
- 4 [Landy v. Amsterdam](#), 815 F.2d 925 (3d Cir. 1987).
- 5 [Tracy v. Curtis](#), 10 Mass. App. Ct. 10, 405 N.E.2d 656 (1980).
- 6 [Haines v. Bankers' Petroleum & Refining Co.](#), 273 S.W. 940 (Tex. Civ. App. San Antonio 1925), writ dismissed w.o.j., (Nov. 11, 1925).
- 7 [Peterson v. Hopson](#), 306 Mass. 597, 29 N.E.2d 140, 132 A.L.R. 1 (1940).



- 8 Kotimsky v. Lubin, 62 F. Supp. 710 (E.D. Ill. 1945); Webb v. Shea, 149 Ark. 406, 232 S.W. 602 (1921).
- 9 Patterson v. Witter, 425 S.C. 213, 821 S.E.2d 677 (2018).  
A no-action clause, a in pooling and servicing agreement (PSA) governing real estate mortgage investment conduit (REMIC) securitization trusts, applied to all of investors' contract and tort claims against the trustee, the mortgage-loan servicer, and affiliates that arose from the investors' ownership interests in active trusts, and thus, before bringing claims, the investors were required to satisfy the clause's requirements for presuit demand on the trustee and to offer to indemnify the trustee for bringing the action, where the clause by its terms applied to "any proceeding, judicial or otherwise, with respect to [PSA]." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162 (S.D. N.Y. 2011).
- 10 *Youngers v. Virtus Investment Partners Inc.*, 195 F. Supp. 3d 499 (S.D. N.Y. 2016), motion to certify appeal denied, 228 F. Supp. 3d 295 (S.D. N.Y. 2017) (applying Delaware law).
- 11 *Greer Inv. Co. v. Booth*, 62 F.2d 321 (C.C.A. 10th Cir. 1932); *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162 (S.D. N.Y. 2011); *Clairdale Enterprises, Inc. v. C. I. Realty Investors*, 423 F. Supp. 257, 23 Fed. R. Serv. 2d 699 (S.D. N.Y. 1976); *Greenspun v. Lindley*, 36 N.Y.2d 473, 369 N.Y.S.2d 123, 330 N.E.2d 79, 88 A.L.R.3d 697 (1975).  
While no-action clauses have not been enforced when they would result in the absurdity of asking the trustee to sue itself, these clauses have been enforced when they would require the trustee to sue one of the other managers of the trust that the trustee is required to supervise. *SC Note Acquisitions, LLC v. Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516 (E.D. N.Y. 2013), *aff'd*, 548 Fed. Appx. 741 (2d Cir. 2014) (applying New York law).  
Neither the mere naming of all the trustees of a real estate investment trust nor the allegation that the trustees had acted in a "grossly negligent" fashion excused the demand requirement for a shareholder derivative action. *In re Mortgage and Realty Trust Securities Litigation*, 787 F. Supp. 84 (E.D. Pa. 1991) (applying Maryland law).
- 12 *Cohen v. U.S. Trust Securities Corp.*, 311 Mass. 152, 40 N.E.2d 282 (1942).
- 13 *Futrell v. Triplett*, 84 F.2d 861 (C.C.A. 8th Cir. 1936) (applying Arkansas law); *Halebian v. Berv*, 869 F. Supp. 2d 420 (S.D. N.Y. 2012), *aff'd*, 548 Fed. Appx. 641 (2d Cir. 2013) (applying Massachusetts law).
- 14 *Booth v. Greer Inv. Co.*, 7 F. Supp. 576 (N.D. Okla. 1934) (applying Oklahoma law).
- 15 *Deering v. Stites*, 257 Ky. 403, 78 S.W.2d 46 (1934).
- 16 *Skolnik v. Rose*, 55 N.Y.2d 964, 449 N.Y.S.2d 182, 434 N.E.2d 251 (1982).  
As to what law governs business trusts, see § 4.
- 17 *Davis v. Hudgins*, 225 S.W. 73 (Tex. Civ. App. Dallas 1920).  
As to receivership of business trusts, see § 75.
- 18 *Wesson v. Crain*, 165 F.2d 6 (C.C.A. 8th Cir. 1948).  
As to removal of trustee of business trust, see § 37.
- 19 *Bingham v. Graham*, 220 S.W. 105 (Tex. Civ. App. Amarillo 1920).
- 20 *Peterson v. Hopson*, 306 Mass. 597, 29 N.E.2d 140, 132 A.L.R. 1 (1940).
- 21 *Looney v. Wing*, 195 S.W.2d 557 (Tex. Civ. App. Fort Worth 1946), dismissed.
- 22 *Looney v. Wing*, 195 S.W.2d 557 (Tex. Civ. App. Fort Worth 1946), dismissed.

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## 13 Am. Jur. 2d Business Trusts § 86

American Jurisprudence, Second Edition | May 2021 Update

### Business Trusts

Karen L. Schultz, J.D.

### XI. Practice and Procedure

#### B. Shareholders' Actions

## § 86. Shareholder action for accounting of business trust

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The shareholders of a business trust may, in a proper case, maintain an action for an accounting against the trustees.<sup>1</sup> However, an accounting by the trustees will be ordered by a court only where it will serve some definite and useful purpose.<sup>2</sup>

In a proceeding for an accounting by the trustees of a Massachusetts trust, the burden is on the trustees to show that, in the discharge of their duties, they have exercised reasonable skill, prudence, and judgment.<sup>3</sup> Where, however, the trust instrument vests in the trustees of the business trust absolute power to manage and control the property and business of the trust and provides that the shareholders will not have a right to an accounting, shareholders cannot maintain a suit against such trustees for an accounting, in the absence of a showing of an abuse of power or wrongdoing or a misuse of the trust funds by the trustees.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Haskell v. Patterson](#), 165 Ark. 65, 262 S.W. 1002 (1924); [Hawkins v. Smith](#), 153 Kan. 542, 111 P.2d 1108 (1941); [Bingham v. Graham](#), 220 S.W. 105 (Tex. Civ. App. Amarillo 1920).

Investors in real estate mortgage investment conduit (REMIC) securitization trusts failed to allege the existence of a fiduciary or otherwise confidential relationship with the trustee, mortgage-loan servicer, or servicer's affiliates, as required to state a claim under New York law for an accounting of amounts realized from securitizations. [Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.](#), 837 F. Supp. 2d 162 (S.D. N.Y. 2011).
- <sup>2</sup> [Bryan v. Seiffert](#), 1939 OK 315, 185 Okla. 496, 94 P.2d 526 (1939).
- <sup>3</sup> [Cohen v. U.S. Trust Securities Corp.](#), 311 Mass. 152, 40 N.E.2d 282 (1942); [Ashley v. Winkley](#), 209 Mass. 509, 95 N.E. 932 (1911).

4 [Small v. Smith, 294 Pa. 163, 143 A. 786 \(1928\).](#)

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